12

No. ①

Supreme Court, U.S.
FILED

07-631 NOV 8 - 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

◆

PETER ROBERTS,

Petitioner,

versus

THE STATE OF ALASKA,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Alaska**

◆

PETITION FOR WRIT OF CERTIORARI

◆

PETER ROBERTS, Pro Se
c/o DOWNTOWN BICYCLE RENTAL, INC.
333 W. 4th Avenue, Suite 206
Anchorage, AK 99501
(907) 279-3334

QUESTIONS PRESENTED FOR REVIEW

In Alaska, gambling is regulated by the state. Nonprofits can apply to the State for a "gaming" permit. After paying operating expenses and prize money, state law requires net profits be spent on "charitable" activities. In December of 1999, without consulting any governmental agency or community group, two gaming regulators in Juneau approved a free bike loan Program for downtown Anchorage. "The Program" was implemented without notice by "Earth." Earth was organized for educational purposes under § 501(c)(3) of the IRS Code. Undermined seasonal tax-paying bike rental businesses complained. The State chose not to act and refused to explain in writing why it approved the Program.

The questions presented are:

I. Whether an agency's conflicting verbal, investigatory and judicial rationales and a refusal to create a written record of reasons self-proves bad faith justifying application of judicial estoppel against the State.

II. Whether the assertion by a state agency that "there is no requirement of compliance with federal law" in the state statute that it administers permits the state agency to facilitate activities that violate a 501(c)(3) federal tax exemption.

QUESTIONS PRESENTED FOR REVIEW – Continued

III. Whether the right to pursue a lawful occupation as protected by the due process clause and/or the privileges or immunities clause of the Fourteenth Amendment of the U.S. Constitution is infringed when a state agency decides without notice or written explanation to provide tourists a free recreational service that they are able and willing to buy from existing tax-paying businesses.

PARTIES TO THE PROCEEDING

Petitioner Peter Roberts makes his living renting bicycles. Roberts is the sole shareholder and only officer of Downtown Bicycle Rental, Inc. (hereafter "DBR"). Mr. Roberts is a 2002 graduate of New England School of Law. Roberts passed the February 2006 Alaska Bar, but postponed swearing in to preserve an issue of first impression in Alaska: Whether there is a common law exception to the statutory prohibition against lay representation of corporate claims.

Respondent is the State of Alaska. The Alaska Department of Revenue ("the Department") regulates charitable gaming in Alaska.

TABLE OF CONTENTS

Page

Appendix Index vii

Table of Authorities ix

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions 1

Statutory and Regulatory Provisions 2

Statement of Facts 2

Reasons Why Certiorari Should Be Granted 15

POINT I.

JUDICIAL ESTOPPEL SHOULD BE APPLIED AGAINST THE STATE BECAUSE GAMING REGULATORS DENIED AGGRIEVED CITIZENS A WRITTEN DECISIONAL DOCUMENT AND PROVIDED THE OMBUDSMAN AND THE COURTS WITH INCONSISTENT, GROUNDLESS, AND EQUIVOCAL *POST HOC* RATIONALES AND EXCUSES 18

A. The State's Inconsistent Statements Compromised the Integrity of the Judicial Process and Deprived the Public of the Benefit Charitable Gaming Proceeds Are Supposed to Provide 19

B. The Refusal to Issue a Written Decisional Document or Provide the Court with A Clear and Consistent Explanation Self-Proves Bad Faith 22

TABLE OF CONTENTS – Continued

Page

C. The Lower Courts Failed to Follow This Court's Framework for the Orderly Process of Review 23

D. The Petition for Quasi-Estoppel Was Ignored by the Trial Court and Rejected With Erroneous Reasoning on Appeal 25

  1. First ground 25

  2. Second ground 26

E. The Legal Basis for Bad Faith Is Inherent to Judicial Estoppel and Recognized by This Court's "Square Corners" Doctrine 27

F. Conclusion 27

POINT II.

STATE AGENCIES ARE PREVENTED BY THE PREEMPTION DOCTRINE FROM FACILITATING ACTIVITIES THAT VIOLATE A § 501(C)(3) FEDERAL TAX EXEMPTION 28

A. Federal Law and Public Policy Is Designed to Facilitate, Not Undermine Tax-Paying Small Business 29

B. State Support of the Program Violates Federal Public Policy 30

TABLE OF CONTENTS – Continued

Page

C. The State's Assertion that There Is "No Requirement of Compliance With Federal Law" Is a Tacit Admission that Federal Preemption Applies 32

D. Conclusion 34

POINT III.

BECAUSE EXECUTIVE BRANCH ACTION INFRINGED PETITIONER'S RIGHT TO EARN A LIVING AS PROTECTED BY THE FOURTEENTH AMENDMENT, THIS COURT SHOULD DECIDE WHETHER THE RIGHT IS PROTECTED BY SUBSTANTIVE DUE PROCESS, THE PRIVILEGES OR IMMUNITIES CLAUSE, OR BOTH 34

A. What Alaska Did to the Bike Renters Mirrors What Louisiana Did to the Butchers in the *Slaughter-House Cases* ... 35

B. In light of *Saenz*, Certiorari Should Be Granted to Revisit the Alternative and Arguably Original Constitutional Ground 38

C. Petitioner Has Established His Right to Earn a Living Was and Remains Infringed 39

D. Conclusion 42

CONCLUSION 42

APPENDIX INDEX

Page

ROBERTS v. ALASKA, 162 P.3d 1214 (Alaska 2007) .... App. 1-32

ROBERTS v. ALASKA, et al., Summary Judgment Order, 3AN-03-5534CI .... App. 33-53

Superior Court Final Judgment and Award of Attorney's Fees .... App. 54

Supreme Court Order Denying Petition for Rehearing .... App. 55

15 U.S.C. §631 Declaration of Policy .... App. 56

15 U.S.C. §4801 Findings and purpose .... App. 57-58

Affidavit of Clara Ball, User of Earth Bike Program .... App. 59-60

Roberts's Identification of Federal "Commerciality Doctrine" Authorities .... App. 61-62

Roberts's Identification of Authorities Requiring "Operational Nexus" .... App. 62-64

Roberts's "Summary of Argument" for Counts Alleging Executive Branch Violation of Substantive Due Process/Privileges or Immunities' Right .... App. 65-66

Excerpt of Table of Contents from Appellant's Supreme Court Opening Brief Itemizing State's Inconsistent Positions .... App. 67-70

APPENDIX INDEX – Continued

Page

Itemization to the Record of 18 Undisputed Facts Establishing Self-Proving Bad Faith by the State. (Appellant's Opening Brief)..... App. 71-74

Appellant Roberts's Supreme Court Argument Alleging Executive Branch Violation of Substantive Due Process and Privileges or Immunities Clause Right .... App. 75-76

Ombudsman's Report. Gaming Regulators' Reasons for Approving Program .... App. 77-78

Roberts's Notice to Supreme Court Listing Dropped Defendants on Caption.................. App. 79

Roberts's Petition for Rehearing.................. App. 80-86

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Airlie Foundation v. IRS, 283 F.Supp.2d 58 (D.C.D.C. 2002) 31

Bob Jones University v. U.S., 461 U.S. 574 (1983) 29

Bull v. United States, 295 U.S. 247 (1935) 30

Camps Newfound/Owatonna, Inc. v. Town of Harr., Maine, 520 U.S. 564 (1997) 30

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18, 19

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) 21

Craigmiles v. Giles, 110 F.Supp.2d 658 (E.D.Tenn. 2000) 35, 39

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 32

Defenders of Wildlife v. Gutierrez, 484 F.Supp.2d 44 (D.C. 2007) 25

Dunlop v. Bachowski, 421 U.S. 560 (1975) 22

Ft. Stewart Schools v. Fed. Labor Rel. Board, 495 U.S. 641 (1990) 24

Gedrich v. Fairfax Cty. Dept. of Family Services, 282 F.Supp.2d 430 (E.D.Va. 2003) 37

Heckler v. Chaney, 470 U.S. 821 (1985) 15, 18

Page

Heckler v. Community Health Services of Crawford, 467 U.S. 51 (1984) 27

Independent Ins. Agents of Huntsville, Inc. v. Commissioner of I.R.S., 998 F.2d 898 (11th Cir. 1993) 18

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 25

New Hampshire v. Maine, 532 U.S. 742 (2001) 20

Purer v. U.S., 872 F.2d 277 (9th Cir 1989) 20

Recinos DeLeon v. Gonzalez, 400 F.3d 1185 (9th Cir. 2005) 22, 24

Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) 29

Saenz v. Roe, 526 U.S. 489 (1999) 35, 38

SEC v. Chenery Corp., 318 U.S. 80 (1943) 22, 24, 25

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) 35, 38, 42

Wagner v. Director Fed. Emerg. Mgmt. Agency, 47 F.2d 519 (9th Cir. 1988) 20

Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) 23

STATE CASES

Botelho v. Griffin, 25 P.3d 689 (Alaska 2001) 6, 19

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. IV 41

U.S. Const. art. VI 1

U.S. Const. amend. XIV, § 1, cl. 2 .... 16, 36, 38, 41

STATUTES, REGULATIONS & RULES

AS 05.15.140(a) 2, 15, 18

AS 05.15.150(a) 2, 12

AK R. Evid. 801(d)(2)(B) 6

AK R. Evid. 803(8)(a), Hearsay Exceptions, Public Records and Reports 26

RCW 9.46.010 15

15 U.S.C. § 631, Declaration of Policy, "Small Business Act" 2, 28

15 U.S.C. § 4801(a), Findings and Purpose 2

26 U.S.C. § 501(c)(3) .... *passim*

§ 501(c)(3)-1(3)(a) *Educational defined* 5

26 U.S.C. § 6103(b)(2)(A) 8

Sup. Ct.R. 10 .... 24, 41

Page

LAW REVIEWS

Andras Kosaras, *Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums be Tax-Exempt?*, 35 New. Eng. L. Rev. 115 (2000) 30

Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four,* 9 Wm. & Mary L. Rev. 1 (1967) 17

Developments in the Law – Nonprofit Corporations, 105 Harv. L. Rev. 1612, 1633 (1992) 30

Douglas G. Smith, *The Privileges and Immunities Clause of Article IV Section 2: Precursor of Section 1 of the Fourteenth Amendment,* 34 Sand. L.R. 809 (1997) 17

Henry B. Hansman, Article, *Unfair Competition and the Unrelated Business Income Tax,* 75 Va. L. Rev. 605 (1989) 30

Jessica Pena & Alexander L.T. Reid, Note, *A Call for Reform of the Operational Test for Unrelated Commercial Activity in Charities,* 76 N.Y.U. L. Rev. 1855 (2001) 30

John Denvir, *Democracy's Constitution, Claiming the Privileges of American Citizenship* (2001) 17

John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992) 39

TABLE OF AUTHORITIES – Continued

Page

Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges Or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 128 Harv. L. Rev. 110 (1999) 17

Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 33 U.S.F. L. Rev. 37 (1993) 23

Michael Conant, *AntiMonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*. 31 Emory L.J. 785 (1982) 17, 38

Michael Kent Curtis, *Resurrecting the Privileges Or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1 (1996) 17

Nina J. Crimm, *Why All is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M.L. Rev. 1 (1999) 23, 31

Stancey L Winick, Comment, *A New Chapter in Constitutional Law* 28 Hofstra L. Rev. 573 (1999) 39

Steve France, *Dusty Doctrines*, 87 A.B.A.J. 46 (2001) 17

Virginia Richardson, Roderick Darling and Marvin Friedlander, *Exempt Organizations Technical Topics*, <http://www.irs.treas.gov/pub/irs-tege/eotopica00.pdf> 30

TABLE OF AUTHORITIES – Continued

Page

Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L.J. 397 (1993-94) 17

MISCELLANEOUS

Elizabeth Manning, *Food bank's critics cry foul, Health department calls EARTH'S backyard buffet unsafe*, Anchorage Daily News, March 15, 1998, at B1-3 12

George Will, *This Week With David Brinkley (ABC)*, Oct. 16, 1994 NEXIS transcript # 677 34

<http://www.trailsofanchorage.com/2nd_avenue.htm> 3

http://www.wsgc.wa.gov/faq/internet_gambling.pdf 16

Kavan Peterson, *48 states raking in gambling proceeds*, Stateline.org, May 23, 2006 15

Letter from William A. Egan, Governor of Alaska to William E. Beltz, President of the Senate, March 7, 1960 20

Letter from Attorney General John L. Rader to William A. Egan, Governor of Alaska, March 7, 1960 21

16b Am. Jur.2d Con. Law § 592 (1998) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court.

OPINIONS BELOW

The opinion of the Alaska Supreme Court (App. 1-32) is reported at 162 P.3d 1214 (Alaska 2007). The order denying petitioner's petition for rehearing is at App. 55.

JURISDICTION

The judgment of the Alaska Supreme Court was entered on June 22, 2007. (App. 1.) On August 14, 2007, the court denied petitioner's timely petition for rehearing. This court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional Provisions are:

ARTICLE VI: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of Any State to the Contrary notwithstanding.

AMENDMENT XIV, Section 1, Clause 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATUTORY AND REGULATORY PROVISIONS

The relevant federal statutory provisions are:

26 U.S.C. § 501(c)(3) of the Internal Revenue Code

15 U.S.C. § 631(a) Declaration of Policy; (App. 56)

15 U.S.C. § 4801(a) Findings and purpose. (App. 57-58.)

The relevant state statutory provisions are:

AS 05.15.150(a) – Limitation on Use of Gaming Proceeds; (App. 13)

AS 05.15.140(a) – Proof Necessary to Qualify for a Permit. (App. 9.)

STATEMENT OF FACTS

Set forth below are undisputed material facts and the lower courts' review of the them. An undisputed material fact that was not reviewed by the lower courts is indicated with the signal: **[FNR]**. A paragraph of facts not reviewed is signaled: **FACTS NR**.

Federal questions raised below use the signal: **[FQ]**. Federal questions not reviewed are: **[FQNR]**.

Downtown Anchorage

Downtown Anchorage bike rental businesses are geographically limited, seasonal, weather-dependent and reliant on tourists for revenue. There are thousands of hotel rooms in downtown Anchorage. The 11-mile-long Tony Knowles Coastal Trail bike path begins downtown. The trail runs along Cook Inlet through parks.[1] **FACTS NR**

A Public Program Without a Public Process

State gaming regulators approved The Earth Cycle Program ("the Program") based only on its name.[2] This public program was instituted by Earth without any public process across the street from the Anchorage Visitors Center. Earth used gaming proceeds not only to buy bikes, but to pay family members of its treasurer, Michael O'Callaghan, to lend them out. **FACTS NR**

The first site for the Program was in front of the Old Federal Building. Downtown Bicycle Rental, Inc. ("DBR") owner Peter Roberts and other private bike rental business owners complained. One week later, the Federal government told Earth to leave. The Program moved to a second location. Each time the

---

[1] http://www.trailsofanchorage.com/2nd_avenue.htm.

[2] At (App. 17) the Opinion "noted Earth's objective 'to teach and practice individual lifestyles which enhance clean earth, air and water.'" See Earth's Gaming Application.

Program moved, the bike renters complained to the owner of the property and the Program was forced to leave. When the Program landed at its fourth location, the Anchorage International Hostel, it stayed.

Interagency Emails

Behind the scenes, State gaming regulators exchanged interagency emails about the Program they had approved. One regulator called it a "Bicycle Squabble." He wrote that "Roberts is peeved" and gave his colleagues the "Heads Up" to be prepared for calls from reporters. Another email states: "I think that Roberts is screwed!" At the end of the summer gaming regulator Larry Meyers wrote in an email: "think of what we have said and done in the past." **FACTS NR** (App. 72 Fact 6, 8.)

The Commissioner Repudiates Control Over Gaming Proceeds

At the end of July 2000, regulators told Roberts an investigation "is ongoing." One week later, this statement was retracted. In his Complaint and in his briefs, Roberts asserted the regulator lied. Roberts supported his assertion with a corroborating fax and a sworn affidavit. (App. 72 Fact 5.) Roberts challenged the State to refute the charge. The State ignored the challenge. That regulator is now a "former employee" of the state. **FACTS NR**

On August 16, 2000, the bike renters wrote the State asking it to revoke Earth's gaming permit because the Program "is not educational or charitable and serves no public purpose." Here is an excerpt:

> Use of gaming funds received by Earth for its bike program is not a permitted use under any of the criteria of AS 05.15.150(a) limitation on use of proceeds. [(App. 13.)] More specifically, use of proceeds is not educational or charitable. . . . Earth is obligated by its tax exemption to implement educational programs. . . . **As defined by the federal agency that licenses nonprofits, there is no educational purpose served by giving bikes to tourists.**[3] **[FQNR]** Exhibit 10 is an affidavit that demonstrates first-hand that the Earth Bike Program is not in any way educational. . . . Even if Earth's tax exemption allowed it to operate charitable programs, the Earth Bike Program does not qualify. Tourists are not impoverished. Giving bikes to tourists to recreate on the Tony Knowles Coastal Trail is not charitable.[4] (Emphasis added.)

---

[3] Educational defined, § 501(c)(3)-1(3)(a): "The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community."

[4] The Alaska Supreme Court's Opinion (hereafter "Opinion") said the reason why Roberts asked the State to halt the Program was "because it did not lessen neighborhood tensions." (App. 3.)

The cited affidavit is at: (App. 59-60.) **[FNR]** Revenue Commissioner Condon (Gaming is a division of Revenue) issued a four-sentence response. He instructed the bike renters to speak with a deputy on the telephone who would explain why the Department "can't and shouldn't [act]."[5] The attorney general remained silent.[6] Roberts repeatedly demanded the Department create a written explanation of reasons, the demand was repeatedly refused. **FACTS NR** (App. 72 Fact 8.)

The State Tells the Courts the Opposite of What it Tells the Bike Renters and the Ombudsman

During the summer of 2000, while State gaming regulators renounced control over gaming proceeds to the bike renters, State lawyers asserted control over gaming proceeds at the Alaska Supreme Court. **FNR** Here is the first paragraph of the State's Complaint in *Botelho v. Griffin*, 25 P.3d 689 (Alaska 2001).

> Charitable gaming provides charitable organizations a means of raising funds for charitable purposes. Under a **closely regulated regimen**, charities may run games such as raffles, bingo, and pull-tabs, to raise

---

[5] Later, the State said the court could "safely ignore" all unrecorded telephone conversations because they were "inadmissible hearsay." **[FNR]**

[6] Pursuant to AK R. Evid. 801(d)(2)(B), Roberts asked that Law's silence be treated as an adoptive admission. **[FNR]**

> funds for a wide variety of approved purposes. The people of Alaska have authorized the playing of these games of chance – and the customers play them – with the understanding that the money will go to worthy causes. (Emphasis added and **NR.**)

The Attorney General Admits Earth "Should Not Have Received a Gaming Permit."

When the Program returned for a second summer, the bike renters repeated their call for either action or a written record of reasons. Commissioner Condon reiterated his earlier "can't [act]" "conclusion" and then signed his three-sentence letter: "Have a nice summer." **FACTS NR** (App. 72 Fact 4.)

In a recorded telephone conversation, the attorney general acknowledged Earth "should not have received a gaming permit." **[FNR]**[7] (App. 73 Fact 10.)

The Program Ends

Shortly after the bike renters' second written petition for action was rebuffed, the bulk of the Program's bikes were stolen. During the winter of 2001-2002, concerned the Program would return for a third summer, Roberts pressed the IRS to enforce the

---

[7] The Opinion changed this fact: "But the State is not taking an inconsistent position; it has consistently maintained that Earth qualified for a permit." (App. 18.)

Hostel's § 501(c)(3) exemption by restricting Program bikes to Hostel guests. **FACTS NR**

When summer of 2002 began, bikes were restricted to Hostel guests.[8] The IRS is prevented by § 6103(b)(2)(A) of its Code from disclosing if it ever investigated or acted against either the Hostel or Earth. **[FNR]** Earth's § 501(c)(3) status has been terminated.[9] **[FNR]**

State Regulators tell the Ombudsman the Opposite of What State Lawyers told the Alaska Supreme Court

Before Roberts filed suit, the bike renters complained to the state ombudsman. The ombudsman recovered the emails mentioned above. **[FNR]** In her report the ombudsman wrote: "Mr. Meyers stated that Alaska gaming statutes were broadly constructed because the Alaska Legislature did not wish to place intrusive restrictions on charitable gaming in Alaska." **[FNR]** (App. 78.) Mr. Meyers also told the

---

[8] At (App. 4) of the Opinion, the period of time the bikes were offered during the summer of 2001 is characterized as "brief." An equivocal affidavit submitted by an employee of the Hostel who willfully refused to provide copies of its organizing documents as required by Federal law is cited in support. Mr. Roberts disputed Ms. Paikert's affidavit and provided emails and other evidence that **proves** the Program was operated by the Hostel through August of 2001. **[FNR]** *See* Table of Exhibits for Counts 9, 11, 12.

[9] Also, the Anchorage International Hostel's affiliation with American Youth Hostels has been terminated.

Ombudsman that "EARTH does not have to be a charitable organization to obtain a permit, just a 'qualified organization.'" After equating Earth to 13 organizations that "clearly don't qualify as 'charities[,]'" the ombudsman ended her investigation. **[FNR]** (App. 77-78.)

Litigation

On October 10, 2002, DBR and Roberts sued. The State moved to dismiss because DBR was not represented by a licensed attorney. The suit was dismissed without prejudice. DBR assigned its claims to Roberts who refiled the suit. The State challenged the assignment. Even though Roberts was DBR's only shareholder as well as a law school graduate and a sitting applicant to the bar, the trial court dismissed assigned claims but held that "some claims remain."[10]

Two of the remaining claims were Counts 11 and 12. Here is how these counts were presented in the Complaint:

Count 11

> **Substantive Due Process Claim.** The State and each of the Defendants violated Plaintiff's Substantive Due Process rights.

---

[10] Unlike the trial court, the Alaska Supreme Court did not acknowledge Roberts's legal training or his pending status before the bar. Roberts passed the May 2006 bar but chose not to swear-in to retain the issue of lay representation of corporate claims.

> The right to gainful employment and to earn a living is a basic, natural and fundamental right. **[FQ]**

Count 12

> **Inherent Rights/Privileges and Immunity Claim.** The State and each of the Defendants violated Plaintiff's fundamental right to earn a living in violation of Article I § 1 of the Alaska Constitution and the Privileges and Immunities Clause of the Fourteenth Amendment of the U.S. Constitution. **[FQNR]**[11]

Answers to the Complaint

In ¶ 2 of its Answer the State wrote: "Defendants are without information sufficient to admit or deny the allegations who used the Earth bikes. . . ." (App. 83.) In ¶ 59 of its Answer, the State acknowledged "as a statement of law" that "[t]he legislature did not intend for the gaming laws to provide free recreation to out-of-state tourists at the expense of existing tax-paying businesses, their owners, and employees." **FACTS NR** (App. 82.)

The State Repudiates the Program

During motion practice, the State distanced itself from the Program by arguing its approval of it did not constitute "proximate causation" because "Earth arguably would have offered the free bicycles with or without state-sanctioned charitable gaming money." (App. 74 Fact 16.)[12] In the same motion the State said the Program was "similar" to other free bike programs in other cities around the world. **FACTS NR**

---

[11] The Opinion alluded only to Article IV's Privileges or Immunities Clause. (App. 28.)

Michael O'Callaghan and Judicial Notice

The architect of the Program and one of the two people who signed Earth's gaming application was Earth's Treasurer Michael O'Callaghan. O'Callaghan is a well-known Anchorage activist. In its cross-motion for summary judgment, the State submitted a newspaper article about Earth and O'Callaghan and asked the Court to take judicial notice of the "charitable nature of Earth's programs because they were a matter of common knowledge." Citing the same article, Roberts asked for judicial notice of O'Callaghan's lawsuits and reputation for "unyielding tenacity." **FACTS NR**

Here are excerpts from the article:

> [T]he case needs to be foolproof. O'Callaghan is popular – and wily. . . . Anyone who knows Michael O'Callaghan understands the city is

---

[12] After the State won at the trial court, in its motion for attorneys fees, the State wrote: "defendants had nothing to do with the free bicycle program in the first place." **[FNR]** (App. 74 Fact 18.)

> *in for a long fight. . . . [He is] an amiable but* intense hippie who doesn't like government. In the past, O'Callaghan has resorted to hunger strikes and lawsuits to fight for his free fish giveaways and against a state policy that allowed fisherman to strip roe from salmon and dump the carcasses at sea.[13] **FACTS NR**

The State Repudiates Compliance with Federal Law [FQNR]

Nine claims survived motion practice. Roberts was first to move for summary judgment. Count 2 of the Complaint was violation of AS 05.15.150(a) – Limitation of use of State gaming proceeds. (App. 13.) Roberts's first ground for judgment asked that quasi estoppel (aka judicial estoppel) be applied against the State. Roberts's second ground for judgment responded to the State's *post hoc* procedural position that the Program is "similar" to other free bike programs. **[FNR]** Federal law requires a § 501(c)(3) activity to have an "operational nexus" to its purported charitable goal. **[FQNR]**[14] Accordingly, Roberts wrote: "There is *no* evidence that anyone got out of a car and onto a bike." **[FNR] [FQNR]**

---

[13] Elizabeth Manning, *Food bank's critics cry foul, Health department calls EARTH'S backyard buffet unsafe,* Anchorage Daily News, March 15, 1998, at B1-3.

[14] At (App. 19) of the Opinion, the Court acknowledged Roberts's assertion that an "operational nexus" is required but did not identify facts in the record that establish a nexus.

In its cross-motion, the State asserted "there is no such nexus requirement in the [state] statute." **[FNR] [FQNR]** Roberts responded: "Federal law does. A long line of authorities substantiates the conclusion that the State facilitated the destruction of Earth's exemption." **[FNR] [FQNR]** (App. 62-64.) The State countered:

> There is no "operational nexus" requirement, there is no requirement of compliance with federal law, and there is no requirement of advance approval of expenditure of net proceeds. Accordingly, the defendants respectfully request the court to disregard Mr. Roberts' attempt to add requirements for permit issuance that do not exist. **FACTS NR [FQNR]** (App. 74 Fact 17.)

The State asserted that the reason why it approved the Program was because "it is certainly conceivable a person using a free bike might decide to adopt a lifestyle that promotes ecological values." (App. 73 Fact 11.)

The State Wins Based on What the Agency "Could" Have Determined

Without mentioning the petition for quasi-estoppel, without referencing what regulators told the ombudsman (App. 77-78), without acknowledging affidavits describing how the Program was run (App. 59-60), the Superior Court ruled the Program charitable because:

> Traffic in any urban area is a 'public concern' and the Department reasonably **could** have determined that a free bicycle program would help to alleviate the concern. In addition, riding a bicycle is a healthy activity, and promotes good health among its citizens. (Emphasis added.) (App. 41.)

On appeal, as he did below, Roberts repeatedly cited numerous State and U.S. Supreme Court cases that require agencies to quantify their conclusions with clear written grounds. **[FNR]** (App. 72 Fact 8.) The opinion ignored the requirement and affirmed based on what the "Department **could** reasonably have determined. . . ." (Emphasis added.) (App. 14.) The Court also dismissed Roberts's assertion that the State was relying on an unbriefed legal theory because "Roberts addressed the program's impact on traffic in his summary judgment memorandum." (App. 17.)[15]

---

[15] In his summary judgment memorandum Roberts wrote: "There is no evidence that anyone got out of a car and onto a bike. If the defense really believed their *post hoc* conclusion had merit, they would have explained it on paper. No written record can be created because there has never been any evidence to expound." **[FNR]**

REASONS WHY CERTIORARI SHOULD BE GRANTED

Throughout the country states have expanded gambling to raise revenue.[16] Citizens and legislatures have traded the social costs of gambling for less taxes and the public benefit gambling proceeds can provide. Implicit in the understanding is the promise of agency oversight.[17] In this case, an agency that is supposed to compel transparency and integrity from others, has won discretion to deport the opposite of itself.[18] The only thing worse than this double-standard is the way in which it was won. Because it lacked the will to engage Michael O'Callaghan in litigation yet again, an agency that regulates an industry with "a history of connection to crime and corruption"[19] maligned the meaning of charity, repudiated compliance with federal law, repeatedly moved the target, and wrote off seasonal small businesses as acceptable collateral damage.

---

[16] "Twenty-five years ago, gambling was legal in only three states. Now every state except Utah and Hawaii rely on gambling to generate revenues to help avoid raising taxes." Kavan Peterson, *48 states raking in gambling proceeds*, Stateline.org, May 23, 2006.

[17] For example: RCW 9.46.010: "Legislative declaration. The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control." *See also* AS 05.15.140 (App. 20) n. 22 *infra*.

[18] "[D]iscretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetence, lack of will, or other motives, and for that reason '*the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion.*'" *Heckler v. Chaney*, 470 U.S. 821, 848 (1985) (Marshall, J., concurring) (quoting L. Jaffe, Judicial Control of Administrative Action 375 (1965)) (italics in original).

By closing its eyes to what gaming regulators have "said and done in the past" and substituting what the agency "could" have decided instead, a state court of last resort has elevated Orwellian logic above elementary principles of fairness and this Court's briefed but ignored administrative law precedents. (Those and other authorities briefed below are signaled with an asterisk.) Certiorari should be granted to restore integrity to the judicial process and halt the injustice and damage the challenged opinion has and will continue to cause.

Certiorari should also be granted because what the State "said and did" infringed Petitioner's right to earn a living as protected by the Fourteenth Amendment of the U.S. Constitution. *See, e.g.*, 16B Am. Jur.2d Con. Law § 592 (1998). The substantive element of the Due Process clause protects this right. This right also implicates the Amendment's Privileges or Immunities Clause ("the Clause"). Whether the Clause protects citizens against unconstitutional actions by their own state has been intensely debated by constitutional scholars for decades.[20] This case presents facts that brings that debate to a head. In the name of charity, a state court of last resort has awarded a state agency the discretion to supplant, without notice or written explanation, Petitioner's constitutionally-protected right to earn a living.

---

[19] <http://www.wsgc.wa.gov/faq/internet_gambling.pdf>.

---

[20] Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges Or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 128 Harv. L. Rev. 110 (1999);

Michael Conant, *AntiMonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*. 31 Emory L.J. 785 (1982);

Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967);

Douglas G. Smith, *The Privileges and Immunities Clause of Article IV Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 Sand. L.R. 809 (1997);

Michael Kent Curtis, *Resurrecting the Privileges Or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1 (1996);

John Denvir, *Democracy's Constitution, Claiming the Privileges of American Citizenship* (2001);

Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L.J. 397 (1993-94); Steve France, *Dusty Doctrines*, 87 A.B.A.J. 46 (2001).

POINT I. JUDICIAL ESTOPPEL SHOULD BE APPLIED AGAINST THE STATE BECAUSE GAMING REGULATORS DENIED AGGRIEVED CITIZENS A WRITTEN DECISIONAL DOCUMENT AND PROVIDED THE OMBUDSMAN AND THE COURTS WITH INCONSISTENT, GROUNDLESS, AND EQUIVOCAL *POST HOC* RATIONALES AND EXCUSES.

This case does not involve a refusal to take enforcement action, it involves an agency's "affirmative grant of approval under a statute that set clear guidelines for determining when such approval should be given."[21] The vague and barely-legible description of charitable "activities" in the tiny box at the bottom of Earth's two-page gaming application is a disgrace. The description is "not specific." It discloses no facts. It comes nowhere close to the "satisfactory proof" demanded by the legislature[22] and required by federal law.[23] **[FQNR]** Money that by law

---

[21] *Heckler v. Chaney*, 470 U.S. 821, 831* (1985) (citing *Overton Park v. Volpe*, 401 U.S. 402 (1971)).*

[22] AS 05.15.140(a) states: "The department may not issue or renew a permit except upon satisfactory proof that the . . . activity may be permitted under this chapter, and the issuance of the permit is not detrimental to the best interest of the public." (App. 20.)

[23] "If an organization is found to be organized for tax-exempt purposes, it must then demonstrate that it actually conducts activities that entitle it to exemption." *Independent Ins.*

(Continued on following page)

must go to charity, provided free bikes to tourists and summer jobs for the O'Callaghans instead. When undermined business owners complained, they were denied a written record of reasons, mocked in inter-agency emails and told the opposite of what state lawyers were simultaneously telling the Alaska Supreme Court in *Botelho v. Griffin*. (App. 72 Fact 4.) Here, just as in *Overton Park*, "this record contains not one word to indicate that the Secretary [Commissioner Condon] raised even a finger to comply with the command of Congress [or the Legislature]."[24]

A. The State's Inconsistent Statements Compromised the Integrity of the Judicial Process and Deprived the Public of the Benefit Charitable Gaming Proceeds Are Supposed to Provide.

The State's shell game of asserted and abandoned contradictory rationales, conclusions and excuses self-proves bad faith. (App. 71-74.) Accordingly, to protect the integrity of the judicial process, certiorari should be granted and judicial estoppel applied against the State. "The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from

---

Agents of Huntsville, Inc. v. Commissioner of I.R.S., 998 F.2d 898, 900 (11th Cir. 1993).* (App. 62.)

[24] *Overton Park*, 401 U.S. at 423 (Black, J., concurring, Brennan, J.) ("*post hoc* rationalizations" are "inadequate" requiring remand for review based on record before Secretary at time his decision was made).*

deliberately changing positions according to the exigencies of the moment."[25]

Unlike in a zoning dispute, Petitioner does not invoke the doctrine defensively to carve out an exception to a law to benefit himself at the expense of the public, he invokes it offensively to benefit the public whose interests have never been advanced by any of the many inconsistent positions taken by the State in this case.

> A party seeking to raise estoppel against the government must establish 'affirmative misconduct going beyond mere negligence'; even then, 'estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability.' *Purer v. U.S.*, 872 F.2d 277, 278 (9th Cir. 1989)*(quoting *Wagner v. Director, Fed. Emergency Mgmt. Agency*, 47 F.2d 515, 519 (9th Cir. 1988)).*

Gaming regulators' inconsistent statements caused a serious injustice. By repeatedly moving the target, regulators broke the promise the legislature made to the public when it legalized gambling over the veto of then Governor Egan in 1960.[26] A bill Egan's attorney general called a "dangerous experiment" became law in spite of his warning that it "exhibits the impossibility of defining the terms of entry into this activity. . . ."* *Id.* Charity and the legislature's promise of faithful agency oversight supplied the bait for legalizing gambling; agency indifference and arrogance under the banner of judicially-granted discretion supplied the switch. Granting certiorari will ensure the public gets the benefit of its bargain.

---

[25] *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001).*

[26] After "numerous conferences with the Attorney General . . . and others" Egan reached the "conclusion that enforcement problems would pose major and costly difficulties." *See* Roberts's Citation to Supplemental Authority, submitted on Nov. 25, 2006.*

Even though Roberts's opening brief catalogued the State's five conclusions and four rationales in outline form (App. 68-70), the lower courts made no effort to resolve the documented disparities. In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), this Court identified a long line of cases that "held with virtual unanimity that a party cannot create a genuine issue of fact . . . without explaining the contradiction or attempting to resolve the disparity." At oral argument, not one justice asked the State's attorney to explain any of the numerous written and recorded inconsistencies briefed in writing by Roberts and in-person before the *en banc* Court.[27] While the cases cited by *Cleveland* dealt with "purely factual contradictions" *Cleveland* itself held that legal conclusions "require an explanation of ***any*** apparent inconsistency" *Id.* at 806. (Emphasis added.) Certiorari should be granted so the State's agents are forced to "think of what we have said and done in the past." (App 72 Fact 7.)

---

[27] Forty copies on DVD of the oral argument are available and can be promptly mailed to this honorable Court if it so requests.

B. The Refusal to Issue a Written Decisional Document or Provide the Court with A Clear and Consistent Explanation Self-Proves Bad Faith.

In this case, a state agency with a state court's approval has defied this Court's command to provide citizens aggrieved by agency action with a written record of reasons. (App. 72 Fact 8.) "[A] 'reasons' **requirement** promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies. . . ." *Dunlop v. Bachowski*, 421 U.S. 560, 573 (1975)* (Emphasis added.) (App. 81.) It took more than five years and this lawsuit to compel the State to put pen to paper and commit to a reason why gaming regulators in Juneau approved a no-notice public program for Anchorage: "It is certainly conceivable that a person using a free bike might decide to adopt a lifestyle that promotes ecological values." (App. 17.) This is an equivocal, groundless and meaningless phrase. "The basis for an agency determination 'must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action.' "[28]

---

[28] *Recinos DeLeon v. Gonzalez*, 400 F.3d 1185, 1189 (9th Cir. 2005)*(quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).* (App. 83.)

Affirmative misconduct requires "ongoing active misrepresentations" or a "pervasive pattern of false promises" as opposed to an isolated act of providing misinformation. *Watkins v. United States Army*, 875 F.2d 699, 708 (9th Cir. 1989).* That standard was met and exceeded in this case. The State's agents used gamesmanship to malign the meaning of charity and keep aggrieved citizens, the ombudsman and the courts at bay. What the agency "said and did" not only sets a bad example for the gambling industry, it sets a bad example for the exploding nonprofit sector.[29] Because "much of the responsibility for providing social services and aid has been fulfilled by the charitable sector instead of the government[,]"[30] granting certiorari will help "maintain public confidence in, and financial support of that work by ensuring honest and competent management." *Id.* at 39.

C. The Lower Courts Failed to Follow This Court's Framework for the Orderly Process of Review.

The Alaskan courts have "so far departed from the accepted and usual course of judicial proceedings

---

[29] "In 1975 the nonprofit sector made up 6% of the United States' gross domestic product. By 1995 the nonprofit sector made up 10% of G.D.P." Nina J. Crimm, *Why All is Not Quiet on the "Home Front" for Charitable Organizations*, N.M.L. Rev. 1, 8 (1999).*

[30] Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 33 U.S.F. L. Rev. 37 (1993) (internal citation omitted).

. . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10. The lower courts substituted what the State "**could**" have determined instead of reviewing what the facts show it **did** determine. "It is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency." *Fort Stewart Schools v. Federal Labor Relations Board*, 495 U.S. 641, 651-652 (1990).* In light of the State's admission in ¶ 2 of its Answer that it was "without information sufficient to admit or deny the allegations who used the Earth bikes" it was impossible for gaming regulators to make any factual or legal determinations at all. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[31]

Rewind and replay of the record ***proves*** that at no point did ***anyone*** from the State ***ever*** assert that the Program was charitable because it would "help to alleviate" the "public concern" of "traffic in an urban area." The challenged opinion navigates around the record by concluding the "the State made a similar argument before the superior court when it noted Earth's objective 'to teach and practice individual lifestyles which enhance clean earth, air and water.'" (App. 17.) This nondescript "similar argument" is not good enough. "The reviewing court should not attempt itself to make up for such deficiencies: the Court 'may not supply a reasoned basis for the agency's action that the agency itself has not given.'"[32] Even if this substituted "similar argument" were good enough, it still cannot pass muster because it lacks a "reasoned basis." "The orderly functioning of the process of review **requires** that the **grounds** upon which the administrative agency acted be **clearly** disclosed and **adequately** sustained."[33]

---

[31] *Recinos DeLeon v. Gonzalez*, 400 F.3d 1185, 1189 (9th Cir. 2005)*(quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).*

D. The Petition for Quasi-Estoppel Was Ignored by the Trial Court and Rejected With Erroneous Reasoning on Appeal.

At the trial court, Roberts's petition for quasi-estoppel was ignored without comment. On appeal, the petition was considered and rejected on two grounds.

1. **First ground.** "But the State is not taking an inconsistent position; it has consistently maintained that Earth qualified for a permit." (App. 18.) This is circular reasoning; fallacious on its face. It is analogous to dismissing charges at a preliminary

---

[32] *Defenders of Wildlife v. Gutierrez*, 484 F.Supp.2d 44, 51 (D.C. 2007) (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[33] *SEC v. Chenery Corp.* 318 U.S. 80, 94 (1943). (Emphasis added.)*

hearing because an accused with only "slight variations" in an uncorroborated albeit that they refused to write down has consistently maintained that they did not do it. The only thing more troubling than the Court's reasoning, is its edit of the record. The attorney general admitted on tape that Earth "should not have received a gaming permit."[34] (App. 73 Fact 10.)

2. Second Ground. "Any slight variations in the State's explanation – **such as** . . . – do not rise to the level of inconsistency or unconscionability required for application of quasi-estoppel." (Emphasis added.) (App. 18-19.) Here the Court arbitrarily cherry-picked just two of the State's five **conclusions**. (App. 68-70.) Assuming *arguendo* the two identified conclusions are slight, it was not slight for regulators to remain silent knowing the Ombudsman misunderstood what she was "allegedly" told. (App. 18.) (*But see* AK R. Evid. 803(8)(a), Hearsay Exceptions, Public Records and Reports.)* The Courts sided with the State after being told the Program was charitable. (App. 14.) The Ombudsman sided with the State after being told the Program did not need to be charitable. (App. 77-78.) It is unconscionable to let the State have it both ways. Gaming regulators remained seated when good morals and good law required them to stand.

---

[34] **Roberts:** "No, they [Earth] should not have received a charitable gaming permit."

Alaska Attorney General Botelho: "That's right."

E. The Legal Basis for a Bad Faith Claim Is Inherent to Judicial Estoppel and Recognized by this Court's "Square Corners" Doctrine.

After ignoring documented contradictions that self-prove bad faith, Alaska's high court said "Roberts failed to provide us with any legal basis for his [bad faith] claim." (App. 25.) Wrong. Bad faith is an inherent element to judicial estoppel. Bad faith is what the "Square Corners" doctrine is about. "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their governments."[35] Denying citizens a written record of reasons, mocking them in interagency emails and repeatedly moving the target rounds corners. So too does refusing to acknowledge this Court's briefed basis for a bad faith claim.

F. Conclusion

The driving force behind this appeal are unacknowledged, undisputed material facts and this Courts enunciations on administrative law that attach to them. Accordingly, it is in the interest of the judiciary and the public to strip the government of its ill-begotten benefit by applying judicial estoppel against the State.

---

[35] *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 61 (1984).*

POINT II. STATE AGENCIES ARE PREVENTED BY THE PREEMPTION DOCTRINE FROM FACILITATING ACTIVITIES THAT VIOLATE A § 501(C)(3) FEDERAL TAX EXEMPTION.

At issue on this second point of appeal is whether the Federal Preemption Doctrine prevents a State agency from applying a state statute in such a way that it violates Federal law. **[FQNR]** More specifically, whether a state agency can facilitate an activity run by a § 501(c)(3) when that activity lacks an "operational nexus," (App. 62-64), violates the "Commerciality Doctrine" (App. 61-62) and is counter to the enunciated public policy of Congress.[36]

> Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the Congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an institution seeking tax exempt status **must** serve a public purpose and **not be**

---

[36] 15 U.S.C. § 631: "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as it is possible, the interests of small-business concerns in order to preserve free competitive enterprise. . . ."* (App. 56.) *See* Appellant's Opening Brief, Authorities Principally Relied Upon, page 42 and [EXC. 188-189.]

> **contrary** to established public policy. *Bob Jones Univ. v. U.S.,* 461 U.S. 574, 586 (1983) (racially discriminatory policy of tax-exempt university violates public policy) (Emphasis added.)*

A. Federal Law and Public Policy Is Designed to Facilitate, Not Undermine, Tax-Paying Small Business.

Tax paying businesses make it possible for government and exempt entities to exist. "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983). In this case, taxes paid by Petitioner undermined his ability to pay them. "When the government grants exemptions or allow deduction all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" *Bob Jones* at 591 (1983).* Perhaps it is one of the many ironies of living in a state with no income or sales tax (Alaska has the largest oilfield in North America), but thwarting the ability of small business to meet payroll and pay federal taxes is now the affirmed legal position of the Alaska Department of **Revenue**. (App. 45.) Common sense and bypassed authority from this Court demonstrates two branches of Alaskan government got it wrong. "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935).*

A number of law review articles have discussed where the line between nonprofit and for-profit competition should be drawn. "There has recently been considerable agitation from the business community, and particularly from small business against unfair competition from nonprofit firms. . . ."[37] In this case, the lower state courts not only declined to discuss where the line should be drawn, it decided no line should be drawn at all. (App. 25, 44.)

B. State Support of the Program Violates Federal Public Policy.

"The tax exemption for nonprofits raises profound questions of public policy."[38] The trial court concluded, and appellate court affirmed that "[t]here is no public policy that prohibits a non-profit from competing with for-profits, even in spite of their tax-exempt status." (App. 25.) The conclusion comes from a cursory and inapplicable reading of *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 585 (1997). (App. 25, 44.) In this case, what the government did to tax-paying businesses was not competition, it was predatory pricing taken to the extreme. Just because a nonprofit can engage in interstate commerce, it does not follow that there are no rules for the nonprofit to follow. "The nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce." *Id.* at 584. Roberts briefed the lower courts of the applicable federal rules.[39] For example, footnote 39 was copied from pages 38-39 of Appellant's Opening Brief and pasted verbatim into this document. Like footnote 36 *supra*, footnote 38 is a **[FQNR]**. If the affirmed legal position of the Alaska Department of Revenue is permitted to stand, it will sow havoc in the business community and stand as a known obstacle to the express will of Congress.

---

[37] Henry B. Hansman, Article, *Unfair Competition and the Unrelated Business Income Tax*, 75 Va. L. Rev. 605 (1989).

See also, Jessica Pena & Alexander L.T. Reid, Note, *A Call for Reform of the Operational Test for Unrelated Commercial Activity in Charities*, 76 N.Y.U. L. Rev. 1855 (2001);

Andras Kosaras, *Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums be Tax-Exempt?*, 35 New. Eng. L. Rev. 115 (2000);

Virginia Richardson, Roderick Darling and Marvin Friedlander, *Exempt Organizations Technical Topics*, <http://www.irs.treas.gov/pub/irs-tege/eotopica00.pdf>.

[38] *Developments in the Law – Nonprofit Corporations*, 105 Harv. L. Rev. 1612, 1633 (1992).

---

[39] "These policies demand that nonprofits significantly and sufficiently contribute to societal needs . . . and in doing so, they must refrain from competitive behavior with for-profit entities." Nina J. Crimm, *Why All is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M.L. Rev. 1, 21 (1999).* "The commerciality doctrine considers an activity conducted in a commercial manner to be inconsistent with the furtherance of an exempt purpose and hence the activity is considered nonexempt. The courts generally have viewed such activity from the perspective of the consumer and have suggested that if the activity cannot be differentiated from that of a for-profit counterpart organization, the activity is considered commercial in nature. [citing a long line of cases.]" *Id.* at n. 103.* *See also, Airlie Foundation v. IRS*, 283 F.Supp.2d 58, 63 (D.C.D.C. 2002): "Among the major factors courts have considered in assessing commerciality are competition with for profit commercial entities; extent and degree of below cost services provided; pricing policies; and reasonableness of financial reserves." (Internal citations omitted.)***[FQNR]**

> We will find preemption where it is impossible for a private party to comply with both state and federal law, and where "under the circumstances of [a] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[40]

C. The State's Assertion that There Is "No Requirement of Compliance With Federal Law" Is a Tacit Admission that Federal Preemption Applies.

The challenged opinion avoided Roberts's request for preemption by setting up and knocking down a shaky straw man with a wide and inapplicable reach.[41] Of course the State's gaming laws can comply with the federal laws of tax exemption. As Roberts made clear, the issue in this case is whether a state agency ***applied*** state gaming laws to comport or conflict with the federal laws of tax exemption. **[FQNR]** (*See*, *e.g.*, App. 64-66, 76.) The inquiry begins and ends with what the State actually "said and did":

---

[40] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-374, 120 S.Ct. 2288, 2294 (2000)* (brackets in original, internal citations omitted.) (Emphasis added.)

[41] "Because Roberts does not allege that it would be impossible for an entity to comply with both state gaming laws and federal laws of tax exemption, conflict preemption does not apply." (App. 19.)

> "There is no 'operational nexus' requirement, there is no compliance with federal law, and there is no requirement of advance approval of expenditure of net proceeds." **[FQNR]** (App. 82.)

If a state agencies' repudiation of federal law in a court pleading does not trigger preemption, what does?

Instead of condemning the State for repudiating federal law and its duty to make informed decisions ***before*** gaming proceeds are dispensed, the Opinion condemns and mischaracterizes what Roberts wrote instead.[42] Roberts did not "address the Program's impact on traffic." He established that there is "no evidence" that the Program had any impact on traffic at all.[43] By analogy, the Court ruled that it rained yesterday simply because a litigant asserted and established "there is no evidence" that it did. (App. 85.)

---

[42] "Roberts addressed the program's impact on traffic in his summary judgment memorandum." (App. 17.)

[43] *See* n. 15 *supra*.

D. Conclusion.

If government is serious about automobile pollution and global warming, it must recognize there is a right way and a wrong way to do it.[44] Displacing existing tax-paying bike rental businesses causes the opposite of the intended effect. Certiorari should be granted because the Program was approved without notice, without an operational nexus and without consideration of its impact on private enterprise. Therefore, agency application of state law is not only in violation of § 501(c)(3) requirements, it trivializes what is arguably the most challenging environmental issue of our time.

POINT III. BECAUSE EXECUTIVE BRANCH ACTION INFRINGED PETITIONER'S RIGHT TO EARN A LIVING AS PROTECTED BY THE FOURTEENTH AMENDMENT, THIS COURT SHOULD DECIDE WHETHER THE RIGHT IS PROTECTED BY SUBSTANTIVE DUE PROCESS, THE PRIVILEGES OR IMMUNITIES CLAUSE, OR BOTH.

In 1999, this Court breathed new life into the Privileges or Immunities Clause. "Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 527, (1999)*(Thomas, J., dissenting). Plaintiff's position on this point of appeal relies on the historical underpinnings identified by Justice Thomas and on what the dissenters wrote in the *Slaughter-House Cases.*[45] **[FQNR]**

---

[44] In other words, "government should first do no harm." George Will, *This Week With David Brinkley (ABC)*, Oct. 16, 1994 NEXIS transcript #677.*

A. What Alaska Did to the Bike Renters Mirrors What Louisiana Did to the Butchers in the *Slaughter-House Cases.*

After the Civil War, the United States experienced an industrial revolution and economic diversification. Along with the benefits of industrialization came some negative side effects. The Louisiana legislature claimed the Mississippi River had become polluted because New Orleans butchers dumped garbage into it. To help remedy this problem (or, as some have suggested, to use it as an excuse to create a monopolistic enterprise), the legislature created a company to receive and slaughter all city livestock. The Butchers sued. They alleged their right to earn a living as protected by the recently-passed Fourteenth Amendment's privileges or immunities clause had been infringed.

---

[45] "It is one of the privileges and immunities of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments." *Craigmiles v. Giles*, 110 F.Supp.2d 658, 666 (E.D.Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (requirement that sellers of caskets be licensed funeral directors not rationally related to purpose of statute thereby depriving discount casket retailers of right to earn a living) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 106 (1872) (Field, J., dissenting).

Industrialization and its negative side effects continue to this day. One of the worst side effects is automobile pollution and global warming. To help remedy this problem, in cities throughout the world, free bike loan programs help get people out of cars and onto bikes. These programs are implemented with notice and synchronized to the cities they serve. There is an "operational nexus" between the environmental goal and the means chosen to achieve it.

In contrast, in this case, there was neither notice, nexus nor post-approval written justification. Adding insult to injury, the "closely regulated regimen" told seasonal small business owners desperate for prompt action that it "can't and shouldn't [act]" and to: "Have a nice summer." These and other unacknowledged outrageous executive branch actions formed the basis for Roberts's yet to be reviewed substantive due process claim.

> When conduct of a member of the executive branch is at issue, 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense.' To impose liability, 'executive action must be so ill-conceived or malicious that it shocks the conscience;' mere negligence is insufficient. . . . Therefore, in

> assessing whether plaintiff's state a substantive due process claim . . . the determinative inquiry is whether these individuals had some evidence . . . on which to base their action. *Gedrich v. Fairfax County Dept. of Family Services*, 282 F.Supp.2d 439, 460 (E.D.Va. 2003)* (internal citations omitted.) **[FQNR]**

Roberts reiterated on appeal what he unequivocally argued below. Roberts argued "his right to earn a living was infringed not by 'legislative enactment' but by the 'failure and then the refusal of the executive branch to enforce' the gaming statutes." (App. 75, citing Superior Memorandum at App. 65-66.) Roberts's point heading and the argument beneath it are clear. Yet, the Opinion noted "the superior court described these claims as 'difficult to decipher. . . .'" (App. 27 citing App. 50.) Petitioner begs this Court to read (App. 65-66) and then consider what Petitioner "believes": The superior court feigned incomprehension as an excuse to marginalize a pro se litigant and avoid executive branch review.

The appellate court piled on: "We uphold the Superior Court's ruling." (App. 27.) Yet, in the next paragraph, the opinion acknowledges Roberts's challenge to the executive branch and rules against him anyway. Why? Because "he does not explain why the State is not entitled to summary judgment on a challenge to executive action." (App. 27-28.) Roberts's challenge to arbitrary executive branch action, indifference and abuse is explained everywhere.

B. In light of *Saenz*, Certiorari Should Be Granted to Revisit the Alternative and Arguably Original Constitutional Ground.

In light of *Saenz,* consistent with U.S. Supreme Court precedent, this Court can use either the Clause or substantive due process to condemn unconstitutional action by a state against one of its own citizens. One big difference between the butchers and the bike renters that cuts in the latter's favor, is that in this case, the right to earn a living was infringed not by legislative enactment, but by arbitrary action of the executive branch. Therefore, Petitioner's position is consistent with the antimonopoly tradition that evolved in England, a tradition that is one of the "historical underpinnings" in our "constitutional jurisprudence."[46] **[FQNR]**

> Given the historical background of the Fourteenth Amendment as an effort to constitutionalize freedoms enumerated in the Civil Rights Act of 1866 . . . and its commonly expressed legislative intent to nullify the 'black codes' which Southern states were adopting to limit the economic rights of the former slaves; the argument of the *Slaughter-House*

---

[46] "[T]he sovereigns of England from the fourteenth to the sixteenth centuries granted all types of monopolies, some as royal favors and some to finance the crown treasury. Royal grants of monopolies to merchants were common. Consequently, Parliament enacted statutes in the fourteenth century designed to curtail these grants." Conant, *supra* note at 793.

> dissenters may reflect historical truth. Harrison, 101 Yale L.J. at 1388,* see also Stancey L. Winick, *Comment, A New Chapter in Constitutional Law*, 28 Hofstra L. Rev. 573, 593 (1999)* *Craigmiles* at 666.*

While there is no way to undo the injustice the 5-4 majority in the *Slaughter-House Cases* unleashed, this case presents the opportunity to directly confront what the doctrines of Substantive Due Process and Selective Incorporation incrementally apologized for. Certiorari should be granted to revisit the alternative and arguably original and preferable constitutional ground. **[FQNR]**

C. Petitioner Has Established His Right to Earn a Living Was and Remains Infringed.

Masquerading under the guise of charity, Alaska's highest court has awarded a state agency the discretion to supplant without notice or written explanation, a recreational service that tourists are able and willing to pay for.

At the Superior Court, the State asserted that instead of defending through litigation the business he had built, Roberts should "adapt to the interference, either by moving . . . or by offering a product that the charitable . . . [entity] did not offer." **[FNR]** Even if Petitioner accepted the outrageous invitation to switch instead of fight, he cannot. As petitioner explained to the lower courts, he is personally liable for his corporation's lease.**[FNR]**

Roberts explained to the lower courts how and why his right to livelihood had been infringed. Alaska's high court chose not to listen.

> Not only did Roberts fail to show that his right to earn a living was infringed upon, but he also failed to meet the heavy burden of showing that the Department's actions in granting the permit to Earth were not rationally related to the purpose of the program it administered. (App. 28.)

Once again, the court got it wrong. It is axiomatic that people will not pay for a service when they can get it down the street for free. (App. 66.) This fact was bluntly acknowledged by the interagency email: "Roberts is screwed!" **[FNR]** Had Program bikes not been stolen, or had the IRS not stepped in and halted the Program, (there is strong circumstantial evidence that it did), Roberts's chosen livelihood would not just have been infringed, like the three other businesses that wrote the state seeking corrective action, it would be gone. **FACTS NR**

Regarding the "heavy burden" that Roberts failed to meet, the court put the cart before the horse. The burden belongs to the State. Not only did the State fail to meet its burden, it repudiated it. "There is no operational nexus requirement. . . ." *Supra* **[FNR]**

The grossly over- and under-inclusive arbitrarily-implemented Program was rationally related to only two goals: Providing free shore excursions for tourists and outdoor summer jobs for Michael O'Callaghan and his family. **[FNR]** Loaning out free bikes in downtown Anchorage is about as charitable as loaning out free surf boards in Waikiki. The Program provided no public benefit, only private burden.

The Alaska Courts "departed from the accepted and usual course of judicial proceedings" (Sup. Ct. R. 10) in two other significant ways. First it ignored wholesale Roberts's argument, outlined above, that the Fourteenth Amendment's Privileges or Immunities Clause protected him. The Court alluded to protection of Article IV's Clause instead. (App. 28.) Second, the Court failed to quantify how much burden Petitioner must bear. While the Court acknowledged that "under the most generous reading of the facts suggests at most that the Earth Program competed with that business." (App. 28.) And it acknowledged the trial court's ruling that the "'[T]he burden to Mr. Roberts . . . [–] competition [–] is not an unreasonable burden.'" (App. 27 n. 45.) The Court forgot to take the inquiry to the next step. How much government-subsidized competition is Mr. Roberts's business supposed to absorb? How much livelihood must Roberts lose before the Courts decide the government has taken away too much? **[FQNR]**

Now that the Alaska Supreme Court has given the executive branch the green light to reauthorize the Program, unless certiorari is granted, there is nothing to stop a gaming regulator in Juneau from suddenly deciding that Petitioner's business in Anchorage (or another citizen's business elsewhere in the State) must "adapt to the interference, either by moving . . . or by offering a product that the charitable . . . [entity] did not offer."

D. Conclusion.

Because this case presents facts that mirrors what happened in the *Slaughter-House Cases*, and because Petitioner's right to earn a living was infringed and remains at risk, for all of the foregoing reasons, Certiorari should be granted on this third point of appeal.

◆

CONCLUSION

People plan their lives and initiate litigation in reliance on what this Court says. Accordingly, the Court should grant the petition for a writ of certiorari and reverse the decision of the Alaska Supreme Court.

Respectfully submitted,

PETER ROBERTS
c/o DOWNTOWN BICYCLE
RENTAL, INC.
333 W. 4th Avenue, Suite 206
Anchorage, AK 99501
(907) 279-3334

162 P.3d 1214

Supreme Court of Alaska.
Peter ROBERTS, Appellant,
v.
STATE of Alaska, DEPARTMENT OF REVENUE, Wilson L. Condon, Commissioner, and Larry Meyers, Deputy Director, and State Of Alaska, Department of Law, Bruce M. Botelho, Attorney General, Appellees.
No. S-12180.

June 22, 2007.
Rehearing Denied Aug. 14, 2007.

Peter Roberts, pro se, Anchorage, Appellant.

Dan N. Branch, Assistant Attorney General, and David W. Márquez, Attorney General, Juneau, for Appellees.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, BRYNER, and CARPENETI, Justices.

FABE, Chief Justice.

I. INTRODUCTION

Peter Roberts, owner of Downtown Bicycle Rental, Inc., filed a complaint objecting to the Alaska Department of Revenue's issuance of a gaming permit to Earth, a nonprofit organization. The superior court dismissed several counts of the complaint as an invalid assignment of claims from Downtown Bicycle Rental, which had no attorney, to Roberts. The court granted summary judgment for the State on all remaining counts, declared that Roberts was not a public interest litigant, and ordered him to pay attorney's fees. Roberts appeals. Because the assignment of claims was an invalid attempt to circumvent statutory requirements, and because the Department of Revenue did not abuse its discretion or violate public policy or Roberts's constitutional rights when it approved Earth's permit application, we affirm the superior court's ruling. Because Roberts had economic incentive to sue, we also affirm the superior court's determination that he was not a public interest litigant.

II. FACTS AND PROCEEDINGS

A. Facts

Peter Roberts owns Downtown Bicycle Rental, a bicycle rental business located in downtown Anchorage. Roberts objected to a free bicycle loan program that Earth funded with proceeds of a state gaming permit.

Earth applied for and was granted a charitable gaming permit from the Alaska Department of Revenue. Earth conducted gaming activities under the permit, received over $39,000 in gaming proceeds, and spent approximately $7,000 on its Earth Cycle Program.

In June 2000 Earth operated the Earth Cycle Program, offering bicycles to the public for use free of charge from a location in front of the Old Federal Building in Anchorage. Peter Roberts and other bicycle rental business owners sent a letter to the federal General Services Administration, asking that Earth's permit to operate on federal property be revoked. The General Services Administration revoked the permit. Earth then moved its program to another downtown location. In response, Roberts complained to the owner of the land, and Earth moved again. In July 2000 Earth relocated to the grounds of the Anchorage International Youth Hostel. Roberts then asked the hostel to discontinue allowing Earth to operate the program from its property. The hostel refused to revoke its permission.

In the summer of 2000 Roberts complained to the Department of Revenue about Earth's use of gaming funds to operate the Earth Cycle Program. Dissatisfied with the Department's response, Roberts wrote to Attorney General Bruce Botelho and Commissioner of Revenue Wilson Condon, demanding a halt to the program and claiming that the program was not educational and not charitable because it did not "lessen neighborhood tensions." Commissioner Condon issued a written response, indicating that the Department would not take the action Roberts requested.

In September 2001 Roberts filed a complaint with the Alaska Ombudsman, asking the Ombudsman to investigate the Department of Revenue's handling of his complaint. Several months later Roberts filed another complaint with the Ombudsman, expressing concerns about the Department of

Law's handling of the issue. In March 2002 Assistant Ombudsman Linda Lord-Jenkins wrote to Roberts, explaining that she was closing the complaints because she found no "evidence of impropriety, serious flaws in the decision-making process or evidence that the decision [was] completely insupportable." She also informed Roberts that Earth had surrendered its gaming permit in September 2000 and had given the twenty-five bicycles to the hostel to distribute.[1] In May 2002 Acting Ombudsman Maria Moya wrote to Roberts, sustaining closure of the complaint.

B. Proceedings

Appearing pro se, Roberts filed a complaint in October 2002 in Anchorage Superior Court on behalf of himself and Downtown Bicycle Rental. The complaint named the State of Alaska, Revenue Commissioner Condon, Attorney General Botelho, and Deputy Director Larry Meyers of the Department of Revenue as defendants. On December 2, 2002, Judge Peter A. Michalski dismissed the case without prejudice pursuant to AS 22.20.040(a)(2) because Downtown Bicycle Rental was not represented by an attorney, as

---

[1] According to an affidavit submitted by an employee of the hostel, Earth donated the bicycles to the hostel in 2001. The hostel offered the bicycles to the public for a brief period in 2001, until "a group of bicycle rental businesses . . . complained and threatened the hostel with a lawsuit." The hostel discontinued offering the bicycles to the public and began restricting their use to hostel guests by the end of the 2001 summer.

Alaska law requires of corporations.[2] Roberts did not appeal Judge Michalski's order.

In December 2002 Downtown Bicycle Rental assigned its claims to Roberts. In March 2003 Roberts appeared pro se and filed a new complaint in Anchorage Superior Court, naming the same defendants as the first suit.[3] The complaint contained fourteen claims: (1) negligence; (2) violation of AS 05.15.150(a); (3) violation of AS 05.15.140(a); (4) violation of public policy; (5) bad faith/abuse of discretion; (6) breach of fiduciary and statutory duties; (7) violation of the public purpose clause of the Alaska Constitution; (8) a taking of property without just compensation; (9) violation of procedural due process; (10) impairment of freedom to contract; (11) violation of substantive due process; (12) violation of inherent rights/privileges and immunities; (13) tortious interference; and (14) violation of 42 U.S.C. § 1983.

---

[2] AS 22.20.040 provides in relevant part:

> (a) An action or proceeding may be prosecuted or defended by a party in person or by attorney. However,
>
> . . . .
>
> (2) a corporation, either public or private, shall appear by an attorney in all cases unless an exception to the corporation's appearance by an attorney has been explicitly made by law.

[3] Roberts did not appeal Judge Michalski's order, instead filing a new case, which was assigned to Superior Court Judge Sen K. Tan. It is Judge Tan's decision that Roberts appeals in the instant case.

In July 2003 Judge Tan declared Downtown Bicycle Rental's assignment of claims to Roberts invalid as an attempt to circumvent the requirement that corporations be represented by counsel and dismissed all claims arising under the assignment. In March 2004 Roberts filed an amended complaint, adding claims of violation of state antitrust statutes and equal protection. In August 2004 the superior court issued an order dismissing all claims for compensatory and punitive damages arising from the assignment; the claims for declaratory relief remained. The order noted Roberts's voluntary dismissal of four of his claims.[4] The judge dismissed Roberts's negligence claim because the complaint did not allege harm to Roberts individually and dismissed Roberts's 42 U.S.C. § 1983 claim because such claims cannot be brought against state officials acting in their official capacity. The court also dismissed Roberts's claim of an antitrust violation because the alleged injury was "not the type of injury the state antitrust statute intended to protect," the claimed loss was not incurred by Roberts individually, and the statute was "not intended to prevent the State from operating the charitable gaming program."

Nine claims for declaratory relief remained after the superior court's August 2004 ruling. After cross-motions for summary judgment, the superior court granted summary judgment for the State on all remaining counts. The State moved for a Civil Rule 82 award of attorney's fees. The court found that Roberts was not a public interest litigant and ordered him to pay attorney's fees of $5,226. Roberts appeals the superior court's ruling as to the alleged violation of gaming statutes and public policy, bad faith and breach of fiduciary and statutory duty, and violations of substantive due process and privileges and immunities. He also argues the superior court erred in declaring the assignment invalid and contends that the court abused its discretion in determining that he is not a public interest litigant.[5]

---

[4] Roberts voluntarily dismissed his claims alleging a taking of property without just compensation, impairment of freedom to contract, tortious interference, and violation of equal protection.

III. DISCUSSION

A. Standard of Review

We affirm a grant of summary judgment if "there are no genuine issues of material fact and if the movant is entitled to judgment as a matter of law. When making this determination, we draw all reasonable inferences in favor of the non-movant."[6] For questions of law, we adopt "the rule of law that is most persuasive in light of precedent, reason, and policy."[7] We review a superior court's determination of a party's public interest litigant status for an abuse of discretion.[8]

---

[5] Although the State has not argued before us that this case is moot, we note that even if the case were moot, we would hear it to determine the prevailing party for attorney's fees purposes. *See, e.g., LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 651 P.2d 839, 840 n. 1 (Alaska 1982).

[6] *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 447 (Alaska 2002) (internal citations omitted).

When the superior court acts as an intermediate court of appeal, we independently review the merits of the administrative decision.[9] We review discretionary actions that do not require formal procedures for an abuse of discretion.[10] This is the standard we applied in another challenge to the administration of gaming statutes, *Malone v. Anchorage Amateur Radio Club, Inc.*[11] In *Malone*, we reviewed the Revenue Commissioner's denial of a request to operate computerized bingo games and applied the "arbitrary, unreasonable or an abuse of discretion" standard of review after concluding that the statute committed the question of equipment to the Department's discretion.[12]

Here, the statutory provisions at issue also grant considerable discretion to the Department. Alaska Statute 05.15.100(a) provides that "[t]he department may issue a permit to a municipality or qualified organization." Alaska Statute 05.15.130 provides that "[t]he department may supplement the definitions of qualified organizations and activities by . . . adding . . . additional requirements that the department considers necessary for the best interests of the public." Although the Department has not supplemented those definitions, this provision suggests that the legislature intended to grant the Department considerable discretion in administering the statutes. Alaska Statute 05.15.140(a) allows the Department to make a determination whether issuance of a permit is "in the best interests of the public."[13] This discretion, coupled with the lack of formal procedures,[14] make the abuse of discretion standard appropriate.

---

[7] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[8] *Abbott v. Kodiak Island Borough Assembly,* 899 P.2d 922, 923 (Alaska 1995).

[9] *Handley v. State, Dep't of Revenue,* 838 P.2d 1231, 1233 (Alaska 1992).

[10] *Olson v. State, Dep't of Natural Res.,* 799 P.2d 289, 292-93 (Alaska 1990) (noting the standard appropriate for quasi-executive determinations).

[11] 781 P.2d 576 (Alaska 1989).

[12] *Id.* at 578.

---

[13] AS 05.15.140(a) provides:

> The department may not issue or renew a permit except upon satisfactory proof that the applicant is a municipality or qualified organization, the activity may be permitted under this chapter, and the issuance of the permit is not detrimental to the best interests of the public. Upon request of the department, the applicant shall prove conclusively each of these requirements before a permit may be issued or renewed.

[14] The State Administrative Procedure Act does not require formal procedures for the issuance of gaming permits. AS 44.62.330. Though the gaming statutes provide for basic requirements, such as the satisfactory proof requirement in subsection AS 05.15.140, these requirements are minimal. Moreover, the statutes grant the department discretion to determine whether to impose any additional requirements. AS 05.15.130.

B. The Superior Court Properly Declared the Assignment Invalid and Dismissed Claims Arising out of the Assignment.

Judge Michalski dismissed the first case because Downtown Bicycle Rental was not represented by an attorney as required by AS 22.20.040(a)(2).[15] Roberts did not appeal this decision. After the dismissal Downtown Bicycle Rental assigned its claims to Roberts, who filed a new complaint before Judge Tan. Judge Tan declared the assignment invalid as an attempt to circumvent the statute and dismissed all claims arising out of the assignment. The court noted the lack of an applicable statutory exception and ruled that the assignment was invalid because "it would circumvent the requirement . . . that corporations be represented by counsel." Roberts appeals, claiming the assignment was valid.

Roberts asks us to make a common law exception to the statute and allow the assignment, given that he is the alter ego of Downtown Bicycle Rental. He also urges us to "lift[] the corporate veil" to prevent an injustice, contending that "a device designed to protect investors has been hijacked by government officials."

---

[15] AS 22.20.040(a)(2) provides that a corporation "shall appear by an attorney in all cases unless an exception to the corporation's appearance by an attorney has been explicitly made by law."

We conclude that the superior court correctly declared the assignment invalid and refused to recognize an exception to AS 22.20.040(a)(2).[16] Roberts does not argue to this court that the assignment changes the applicability of AS 22.20.040(a)(2). As the State noted in its motion before the superior court, most courts have rejected such assignments as invalid attempts to circumvent the rule that corporations be represented by counsel.[17] As explained by the Second Circuit in *Jones v. Niagara Frontier Transportation Authority,* "[i]n light of the[] policy reasons for preventing a lay person from representing a corporation in litigation, the federal courts have . . . disapproved any circumvention of the rule by the procedural device of an assignment of the corporation's claims to the lay individual."[18]

Although some states have made an exception where a closely held corporation is the litigant's "alter ego,"[19] such cases are inapposite in Alaska given the statute's clear command that any exception be "explicitly made by law."[20] This language suggests that the legislature intended to restrict any exceptions to those specifically set out in statute, precluding the development of common law exceptions. Because the statutory scheme unequivocally requires representation by counsel, the superior court was correct to reject assignment as a procedural device to circumvent the requirement. Piercing the corporate veil in this case, as Roberts advocates, would effectively recognize a common law exception to the statute, which is inappropriate given the statute's clear requirement that any exceptions be explicitly made.

---

[16] The State argues that Roberts's arguments are precluded by his failure to appeal Judge Michalski's order in the first case. But because no assignment had occurred at that time, the order did not address the question of assignment and issue preclusion does not apply. *See McElroy v. Kennedy,* 74 P.3d 903, 907 (Alaska 2003) (noting that issue preclusion requires that the issue be identical to the issue decided in the first action).

[17] *See* Jay M. Zitter, *Annotation, Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not Attorney,* 8 A.L.R. 5th 653 § 12b (1992).

[18] 722 F.2d 20, 23 (2d Cir.1983).

[19] *See* Zitter, *supra* note 17 § 14a-14b.

Moreover, unlike traditional veil piercing, where the court pierces the veil to recognize that the corporation is an alter ego, Roberts essentially argues that he should be allowed to pierce the veil to serve his own interests. To allow an individual the protections of the corporate form, as well as the option to shed the corporate form when it serves his or her interest, undermines the purposes of corporate law. We affirm Judge Tan's ruling that the assignment was an invalid attempt to circumvent AS 22.20.040(a)(2) and affirm his dismissal of all counts arising out of the assignment.

---

[20] AS 22.20.040(a)(2).

C. The Superior Court Properly Granted Summary Judgment to the State on Roberts's Statutory Claims.

1. Issuance of the permit did not violate the statute's limitation on the use of proceeds provision.

Roberts appeals the superior court's ruling that the gaming permit did not violate state gaming laws. He first appeals Judge Tan's grant of summary judgment to the State on his claim that issuance of the permit violated the "limitation on use of proceeds" provision of the Alaska gaming laws. This limitation, found in AS 05.15.150(a), provides that authority to conduct gaming activity is contingent upon dedication of the net proceeds "to the awarding of prizes to contestants or participants and to political, educational, civic, public, charitable, patriotic, or religious uses in the state."[21]

The superior court found that the Department acted reasonably when it determined that the program was charitable and consistent with the limitation on use of proceeds provision. The court noted the definition of charitable organization in the statute[22] and the broad construction of "charity" we applied in *Fairbanks North Star Borough v. Dená Nená Henash.*[23] The superior court reasoned that Earth's articles of incorporation state that its purpose was to "teach and practice individual lifestyles which enhance clean earth, air and water." Earth's stated purpose fits within the statutory definition of a charitable organization. Traffic in any urban area is a "public concern" and the Department reasonably could have determined that a free bicycle program would help to alleviate the concern. In addition, riding a bicycle is a healthy activity, and promotes good health among its citizens. The Department made a reasonable determination that Earth and its bicycle program fit within the statutorily defined restrictions for charitable purposes.

---

[21] AS 05.15.150(a) further provides that

> "[p]olitical, educational, civic, public, charitable, patriotic, or religious uses" means uses benefiting persons either by bringing them under the influence of education or religion or relieving them from disease, suffering or constraint, or by assisting them in establishing themselves in life, or by providing for the promotion of the welfare and well-being of the membership of the organization within their own community. . . .

The superior court further noted that "[t]he statutory language is very broad, and the literal language of the statute covers matters of public welfare."

---

[22] AS 05.15.690(7) defines "charitable organization" as "an organization, not for pecuniary profit, that is operated for the relief of poverty, distress, or other condition of public concern in the state."

[23] 88 P.3d 124, 132 (Alaska 2004) (applying the "broad common law definition of 'charity'" in determining whether Native nonprofit corporation qualified for charitable purposes tax exemption).

Roberts contends that the superior court erred because Earth's use of proceeds for its free bicycle program does not fall within the statutory limitations. He also maintains that the court relied on a theory that the State did not argue and that was not supported by sufficient facts. Roberts also challenges the superior court's interpretation of the statute, arguing that the court gave the term "public concern" greater importance than other terms of the statute.

We conclude that the superior court properly granted summary judgment to the State. The statutory language encompasses a vast array of possible programs and allows proceeds to be used for a broad range of uses, including "political, educational, civic, public, charitable, patriotic, or religious uses."[24]

This broad reading of the statutory language is supported by our decision in *Botelho v. Griffin*, where we held that "[b]y requiring a portion of the money spent on charitable gaming to benefit the public generally, Alaska's gaming laws create the effective equivalent of a charitable trust."[25] The *Restatement (Third) of Trusts* enunciates a broad definition of charitable trusts, providing that

> [a] trust purpose is charitable if its accomplishment is of such social interest or benefit to the community as to justify permitting the property to be devoted to the purpose in

---

[24] AS 05.15.150(a).

[25] 25 P.3d 689, 693 (Alaska 2001).

> perpetuity and to justify the various other special privileges that are typically allowed to charitable trusts.[26]

This broad definition of charitable trust is consistent with the broad common law definition of charity we have applied in other contexts.[27] Within this broad conception of charitable purposes, the Department's grant of a permit to Earth to use proceeds for the Earth Cycle Program is not an abuse of discretion.[28] The stated purpose of Earth's programs, "to awaken groups to the importance of a clean environment and to teach lifestyles which support a clean environment," falls within the range of uses permitted by the statute. The Earth Cycle Program, which provided free bicycles for use by the general public, rationally falls within the organization's stated purpose of teaching lifestyles that support a clean environment. Moreover, as the superior court found, the Department could reasonably have determined that riding bicycles promotes health and alleviates traffic, both of which are public concerns and provide social interest or benefit to the community. The Earth Cycle Program is rationally related to the objectives of the organization, and those objectives fall within the broad range of charitable purposes envisioned by the statute.[29] We therefore also reject Roberts's argument that the superior court erred by giving the words "public concern" greater importance than other terms in the statute. The superior court properly interpreted the statute to allow a broad array of charitable programs, including the Earth Cycle Program.

---

[26] RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003). The purposes of charitable trusts identified in the Restatement largely mirror those of the statute, and include the relief of poverty, the advancement of religion, the promotion of health, government and municipal purposes, and other purposes that are beneficial to the community. *Id.* at § 28.

[27] *See, e.g., Fairbanks N. Star Borough,* 88 P.3d at 132.

[28] Because we hold that issuance of the permit was consistent with the statutory scheme establishing a charitable trust, we reject Roberts's argument that the program is inconsistent with the State's position in *Botelho v. Griffin.*

Roberts argues that the superior court decided this issue on an unargued theory. But the State made a similar argument before the superior court when it noted Earth's objective "to teach and practice individual lifestyles which enhance clean earth, air and water." The State contended that "[i]t is certainly conceivable that a person using a free bike might decide to adopt a lifestyle that promotes ecological values." Moreover, Roberts addressed the program's impact on traffic in his summary judgment memorandum.

We reject Roberts's argument that quasi-estoppel precludes the State from arguing that the program is charitable.[30] Quasi-estoppel, which applies when a party advances a position so inconsistent with a previous position that it would be unconscionable to allow the party to assert the second position,[31] is inapposite. The crux of Roberts's argument appears to be that the Department should be estopped from defending its action because of its refusal to explain its decision in writing and because Deputy Director Larry Meyers allegedly told the Ombudsman that an organization need be only a "qualified organization," and not a charitable organization, to qualify for a permit. But the State is not taking an inconsistent position; it has consistently maintained that Earth qualified for a permit.[32] Any slight variations in the State's explanation – such as whether Earth was a "charitable organization" or fell into the more broad category of "qualified organization" – do not rise to the level of inconsistency or unconscionability required for application of quasi-estoppel.

---

[29] Roberts's argument, unsupported by any authority, that the program is over and underinclusive does not apply. As the State correctly notes, the statute does not require that all proceeds be dedicated to poor citizens.

---

[30] The State argues that Roberts waived this argument, along with several other arguments, because he relied on incorporated material from his memoranda before the superior court. But because pro se litigants are held to less demanding standards and because Roberts's briefing before this court adds to his arguments below, we do not consider Roberts's arguments waived and address the merits. *See, e.g., Gilbert v. Sperbeck,* 126 P.3d 1057, 1062 (Alaska 2005) (noting that we hold pro se litigants to less demanding standards).

[31] *Keener v. State,* 889 P.2d 1063, 1067 (Alaska 1995).

[32] *Cf. Brandal v. State, Commercial Fisheries Entry Comm'n,* 128 P.3d 732, 741 (Alaska 2006) (holding that quasi-estoppel did not apply where the Commission had consistently advanced the position that appellant did not qualify for a permit).

Roberts also argues that the superior court erred by rejecting his argument that federal law preempts state law and does not allow the permit program to extend to the Earth Cycle Program. Roberts maintains that because Earth is a tax exempt organization under 26 U.S.C. § 501(c)(3), federal law preempts any state law that would permit Earth to use gaming proceeds without a demonstration of "operational nexus" between how the proceeds are used and the organization's charitable goals. But as authority cited by Roberts recognizes, conflict preemption applies only where "it is impossible for a private party to comply with both state and federal law," and where "'under the circumstances of [a] particular case, [the challenged state] law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'"[33] Because Roberts does not allege that it would be impossible for an entity to comply with both state gaming laws and federal laws of tax exemption, conflict preemption does not apply. The superior court properly granted summary judgment for the State with respect to the "limitation on use of proceeds" provision.

---

[33] *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372-73, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

2. Issuance of the permit did not violate the statute's satisfactory proof requirement.

Roberts argues that the permit also violated gaming statutes because the State approved Earth's permit without "satisfactory proof" that the permit would not be detrimental to the bests interests of the public. The satisfactory proof requirement is found in AS 05.15.140(a), which provides:

> The department may not issue or renew a permit except upon satisfactory proof that the applicant is a municipality or qualified organization, the activity may be permitted under this chapter, and the issuance of a permit is not detrimental to the best interests of the public. Upon request of the department, the applicant shall prove conclusively each of these requirements before a permit may be issued or renewed.

Roberts argues that the permit was detrimental to the best interests of the public because "'no benefit to society' accrues when government provides tourists with recreation that they would otherwise pay for." But the superior court found that Roberts was equating "his business interests and profits with the 'best interests of the public.'" The superior court further determined that the Department of Revenue had a reasonable basis for its grant of a permit to Earth and concluded that "[e]ven if this court substituted its judgment, and applied the law to the undisputed facts, approving a permit to provide free bicycles to the public is not detrimental to the best interests of the public."

In the space for "Dedication of Net Proceeds," Earth's application indicated that "[t]he net proceeds will be used to awaken social, political, and fraternal groups to the importance of clean earth, air, and water; to teach and practice individual lifestyles which enhance clean air, earth, and water; to operate the Earth Cycle Program and to distribute food which is presently being wasted in the State of Alaska."[34] This information was provided "under penalty of unsworn falsification."

Based on this information provided by Earth, combined with the brief explanation of intended uses of the proceeds in the application, Earth's status as a nonprofit organization at the time, and the absence of any information to suggest that the use of proceeds would be detrimental, the Department reasonably determined that Earth provided satisfactory proof that the permit would not be detrimental to the public's best interests.

As the superior court noted, Roberts's argument that the program harmed the public interest relies on the assumption that something detrimental to his business interests would be detrimental to the public interest. But even if the program had interfered with his business – a fact that was not established – such interference does not render the program detrimental to the public interest as a whole.[35]

---

[34] This information mirrors that listed on Earth's Articles of Incorporation. Earth indicated on its application that it was a 501(c)(3) charitable organization, and the superior court found that Earth was tax exempt for the period in question.

Roberts does not allege that anything in Earth's application should have suggested to the Department that issuance of the permit would be detrimental to the public interest. Rather, he suggests the Department should have asked different questions and obtained more information from Earth before issuing the permit. But the statutory scheme extends discretion to the Department to determine how to evaluate permit requests.[36] In other contexts where an agency has considerable discretion, we have been reluctant to intrude on agency decision making. For example, in *Vick v. Board of Electrical Examiners*, a private citizen sought to compel the board to file an accusation against another party.[37] We declined to extend this power to a private citizen, noting that to allow private citizens to compel the board to file accusations would likely create an enormous burden on public officials.[38] We reasoned that "[j]udicial intrusion into areas traditionally committed to executive discretion would make the processes of government more cumbersome and less efficient. In the absence of obvious and compelling reasons, that is a result which should be avoided."[39]

---

[35] Roberts argues that the State's position in *Botelho v. Griffin* entitles him to summary judgment on this basis. But *Griffin* held that the gaming statutes create a charitable trust, and charitable trusts broadly define the public interest. 25 P.3d at 693. *Griffin* buttresses the superior court's holding.

[36] AS 05.15.140(a) provides that "[u]pon request of the department, the applicant shall prove conclusively each of these requirements before a permit may be issued or renewed."

[37] 626 P.2d 90, 92 (Alaska 1981).

Although Roberts does not seek enforcement action, our reasoning in *Vick* applies. Roberts's interpretation of the "substantial proof" requirement would impose a much higher standard of proof than the Department's interpretation. In this case, the legislature has delegated discretion to the Department to determine whether a permit would be detrimental to the public interest and to assess the information necessary to support its determination. The "public interest" is a vague concept and requires the Department to weigh complex public policies, particularly where gaming is involved. Where such delegation has occurred and where Earth's application on its face does not suggest it would be detrimental to the public interest, the Department did not abuse its discretion by determining that the "satisfactory proof requirement" was met. While we do not suggest that a case could not arise where the substantial proof requirement was clearly not met, this is not such a case. The superior court properly granted summary judgment for the State on Roberts's claim that issuance of the permit violated the satisfactory proof requirement of AS 05.15.140(a).

---

[38] *Id.* at 95.

[39] *Id.*

D. The Superior Court Properly Granted Summary Judgment to the State on Roberts's Nonstatutory Claims.

1. Issuance of the permit did not violate public policy, fiduciary or statutory duties.

Roberts argues that the State's grant of a permit to Earth violated public policy. He cites a federal statute (the declaration of policy of the United States Small Business Administration), a state statute (AS 10.15.565),[40] and *DeArmond v. Alaska State Development Corp.*,[41] as bases for public policies allegedly violated by issuance of the permit.

---

[40] Roberts cites AS 10.15.565 of the Alaska Cooperative Corporation Act, but the page he references from his summary judgment motion below quotes the text of AS 10.15.570, entitled "Declaration of public policy that cooperatives are not in restraint of trade." Roberts's motion quotes the statute's provision that provides:

> It is the public policy of the state to encourage the efficient production and distribution of agricultural and other products derived from its natural resources or labor resources.

[41] 376 P.2d 717, 721-22 (Alaska 1962) (holding that appropriation of funds for the Alaska State Development Corporation was consistent with the public purpose clause of the Alaska Constitution and noting that encouraging new business was a legitimate public purpose).

The superior court relied on *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*[42] for the proposition that nonprofit organizations may engage in commerce and compete with for-profit entities. The court concluded that no public policy prohibits nonprofit entities from competing in the marketplace and granted summary judgment for the State on the claim for violation of public policy.

We agree. As explained above, we uphold the superior court's ruling that issuance of the permit did not violate gaming statutes. Those statutes embody the public policy of gaming as announced by the legislature. Because we hold that issuance of the permit was consistent with those statutes, it was therefore consistent with the legislature's policy. Roberts's claim is without merit.

We also uphold the superior court's grant of summary judgment to the State on Roberts's claims of bad faith and breach of fiduciary and statutory duties. On Roberts's bad faith claim, the superior court noted that "it is not clear what claim is being pled" but reasoned that "the tort of bad faith arises in the context of an insurer and insured" and was inapposite. Roberts failed to provide us with any legal basis for his claim.

Moreover, as the superior court noted, even if there were an applicable bad faith cause of action,

---

[42] 520 U.S. 564, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997).

Roberts's bad faith claim depends on the notion that the State made a mistake and refused to correct it. Because we hold that issuance of the permit complied with statutory requirements, we agree with the superior court that the Department made "no mistake in the issuance of the permit . . . [and therefore had] no duty to correct any mistake."

Similarly, Roberts's claims for breach of statutory and fiduciary duties also fail. We assume without deciding that such claims have a legal basis. But we hold that the State acted in accordance with the gaming statutes in issuing the permit, and compliance with the statute negates any claim for breach of statutory or fiduciary duty.

2. Issuance of the permit did not violate Roberts's constitutional rights.

Roberts argues the State was not entitled to summary judgment on his claim that the State violated his substantive due process right to gainful employment and to earn a living or his claim that the State violated his fundamental right to earn a living in violation of article I, section 1 of the Alaska Constitution and the Privileges and Immunities Clause of the United States Constitution. He argues that the superior court erred by applying rational basis review to the legislature's enactment of the gaming laws. He also contends that his challenge was directed not at the gaming statutes, but rather at the executive branch's authorization of the Earth Cycle Program.

The superior court concluded that the statute met rational basis scrutiny.[43]

We uphold the superior court's ruling. Under our jurisprudence, rational basis is the appropriate test unless a fundamental right is at issue; the party seeking to establish a violation under rational basis review has a heavy burden.[44] Not only has Roberts failed to articulate how the statutes violate his right to earn a living,[45] but the State identified a rational purpose for the gaming laws – to permit qualified organizations to raise money through authorized gaming activities.

Roberts argues that the superior court misread his argument as a challenge to the statutes and failed to recognize that he challenged executive action, but he does not explain why the State is not entitled to summary judgment on a challenge to executive action. The Earth Cycle Program did not prevent Roberts from operating his own business – the most generous reading of the facts suggests at most that the Earth program competed with that business. Not only did Roberts fail to show that his right to earn a living was infringed upon, but he also failed to meet the heavy burden of showing that the Department's actions in granting the permit to Earth were not rationally related to the purpose of the program it administered. Moreover, our holding that issuance of the permit was consistent with the statute forecloses any debate over whether the Department acted rationally in issuing the permit.

---

[43] The superior court described these claims as "difficult to decipher" but concluded that Roberts was alleging that the "gaming statutes violate [Roberts's] right [to] earn a living by allowing non-profit entities to compete with his for-profit business."

[44] *See Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough,* 527 P.2d 447, 452 (Alaska 1974); *see also Dunn v. Municipality of Anchorage,* 100 P.3d 905, 909 (Alaska App.2004). Roberts's brief does not assert that the right to earn a living is a fundamental right.

[45] Judge Tan's ruling notes that Roberts "continues to run his business and that right has not been taken away. . . . [T]he burden to Mr. Roberts . . . [–] competition [–] is not an unreasonable burden."

We also uphold the superior court's grant of summary judgment on Roberts's privileges and immunities claim. The Privileges and Immunities Clause "does not . . . protect the citizens of a State against the legislative power of their own State."[46] Roberts does not allege that he is an out-of-state citizen adversely affected by this state's statute or program. The privileges and immunities clause does not restrict the State's actions in this case. The superior court properly granted summary judgment to the State.

---

[46] *Craigmiles v. Giles,* 110 F.Supp.2d 658, 665 (E.D.Tenn.2000), *aff'd,* 312 F.3d 220 (6th Cir.2002) (holding that statute at issue did not violate the Privileges and Immunities Clause).

E. The Superior Court Did Not Abuse Its Discretion When It Ruled that Roberts Did Not Qualify as a Public Interest Litigant.

The superior court awarded $5,225 in attorney's fees to the State as the prevailing party. Roberts argues that he should be considered a public interest litigant. Because Roberts filed this case in March 2003,[47] the four-factor test for public interest litigant status applies. This test asks: (1) is the case designed to effectuate strong public policies; (2) would numerous people benefit if the litigant succeeded; (3) could only a private party have been expected to bring the suit; and (4) would the litigant have lacked sufficient economic incentive to file suit?[48]

Roberts argues that he meets all four factors of the test. He contends that he advances public policy because the case related to statutory language on matters of public welfare. He argues that the second factor is met, contending that numerous people benefit from the case because "all citizens benefit when the State's legal position is consistently applied and transparently explained in writing." He argues that the third and fourth factors are met, maintaining that he had no economic incentive because once "assigned economic injury was removed from the case, the only claims that could possibly remain are public interest claims."

---

[47] In May 2003 the legislature passed House Bill 145, which amended AS 09.60.010 to prohibit discrimination in the award of attorney's fees "based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors." Ch. 86, § 2, SLA 2003. The act "applies to all civil actions and appeals filed on or after" September 11, 2003. Ch. 86, § 4, SLA 2003. Because Roberts filed the complaint in this case on March 14, 2003, this case predates the effective date of the statute, and the previous public interest litigant doctrine applies.

[48] *Abbott v. Kodiak Island Borough Assembly*, 899 P.2d 922, 923 (Alaska 1995).

The superior court found that it was "doubtful" but "conceivable" that the first factor was met, but concluded that the second factor was not met because the case would only benefit businesses that rent bicycles in downtown Anchorage. The court found that although the third factor was "perhaps" met, Roberts could not meet the fourth factor because he had economic incentive to sue. Because the superior court's decision turned on the fourth factor, we focus our analysis on that factor.[49] The superior court's finding that Roberts had economic incentive to sue is consistent with our decisions in *Abbott v. Kodiak*

---

[49] The superior court also found that Roberts's case benefitted only downtown bicycle renters. While this is true of his requests for compensatory damages, Roberts's request for declaratory relief concerning the scope of the gaming statutes could benefit a larger population. But we need not address this issue because the superior court's ruling on the fourth factor was not an abuse of discretion.

Island Borough Assembly[50] and *Stein v. Kelso.*[51] In *Abbott,* several homeowners appealed a zoning decision of the Kodiak Assembly, arguing that it amounted to an unconstitutional taking of property.[52] The superior court upheld the Assembly's decision and found that the homeowners did not qualify as public interest litigants. In affirming the decision, we reasoned that where homeowners "believed the economic harm facing them was so substantial that they felt they had a viable taking without just compensation claim," the superior court's finding that owners had an economic interest in litigation was not an abuse of discretion.[53] Similarly, in *Stein v. Kelso,* we upheld an award of attorney's fees against miners who challenged an administrative permit decision as an unconstitutional taking.[54] Noting that the miners' pleadings sought a ruling that they had "lost their property rights and must be justly compensated," we rejected the miners' claim that they had no economic interest in the suit.[55]

Like the plaintiffs in *Stein* and *Abbott,* Roberts's initial complaint requested personal economic relief. As the State recognizes, this suggests that Roberts did not lack financial incentive to bring suit. Roberts suggests that he became a public interest litigant after the superior court's order dismissing all claims for relief, except declaratory relief. While it is true that Roberts did not abandon his suit after the financial claims were eliminated, he also appeals the superior court's ruling that the assignment failed. This assignment ruling is the basis for the superior court's elimination of all but the claim for declaratory relief; presumably if we had reversed it, Roberts's claims for compensatory damages could be viable. Given his pursuit of compensatory relief in this initial claim and indirectly in this appeal, the superior court's ruling on public interest litigant status was not an abuse of discretion.

---

[50] 899 P.2d 922.

[51] 846 P.2d 123 (Alaska 1993).

[52] 899 P.2d at 923.

[53] *Id.* at 925.

[54] 846 P.2d at 127.

[55] *Id.*

IV. CONCLUSION

We hold that the superior court properly granted summary judgment for the State on Roberts's remaining claims, properly dismissed the assigned claims as invalid, and properly concluded that Roberts was not a public interest litigant. We therefore AFFIRM the decision of the superior court.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PETER ROBERTS,
an individual,

Plaintiff,

v.

THE STATE OF ALASKA,
WILSON CONDON,
an individual, BRUCE
BOTHELO, an individual,
and LARRY MEYERS,
an individual,

Defendants.

Case No.
3AN-03-5534CI

SUMMARY JUDGMENT ORDER

I. Introduction and Background Facts

Peter Roberts, owner of Downtown Bicycle Rentals has a bicycle rental business in downtown Anchorage. In June 2000, a non-profit organization, Earth, offered one-speed bicycles for rent without charge also in a downtown location. Mr. Roberts was not pleased at the development, and wants to stop Earth from continuing its free bicycle rental activities.

Earth applied for a charitable gaming permit at the Alaska Department of Revenue.[1] Earth was granted a gaming permit and in early 2000, conducted some gaming activities in Wasilla. From the money generated, Earth purchased a number of bicycles. Earth intended to offer the bicycles for free use during the summer months.

In June of 2000, Earth was given permission to operate its bicycle program in front of the Old Federal Building in downtown Anchorage. The program drew immediate attention from Mr. Roberts and others. Mr. Roberts and other bicycle rental business owners were successful in persuading the General Services Administration ("GSA") to revoke Earth's permit to operate its program in front of the Old Federal Building.

Undaunted by the GSA's revocation of its permit, Earth moved its program to a different location downtown. Again, Mr. Roberts' and others' complaints were successful in ridding downtown of this unwanted new competition to their businesses. Earth again changed its location. The free bicycle program eventually found a home at the Anchorage International Youth Hostel. Mr. Roberts and others complained to the hostel about the free bicycle program, asking the hostel to not allow the program to be run on their site. The hostel refused to revoke its permission to Earth.

---

[1] Earth is not a party to this suit.

After Mr. Roberts tried to get the state to revoke Earth's permit and failed, Mr. Roberts filed suit against the state. Mr. Roberts claims, *inter alia,* that the Department of Revenue erroneously granted Earth a gaming permit, the Department erroneously allowed Earth to use the gaming proceeds for a purpose not within the statute, and that the state's activities violated several of his state and federal constitutional rights. Mr. Roberts moved for summary judgment on several counts and the state made a cross-motion for summary judgment including all the remaining counts.[2]

II. Standards of Review

Mr. Roberts is a *pro se* litigant in this matter. A Court will "hold the pleadings of *pro se* litigants to less stringent standards than those of lawyers," particularly where "lack of familiarity with rules" rather than "gross neglect or lack of good faith" underlies litigants' errors. *Wright v. Shorten,* 964 P.2d 441, 444 (Alaska 1998). Judges should "inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish." *Breck v. Ulmer,* 745 P.2d 66, 75 (Alaska 1987). The court should further inform *pro se* litigants of any specific defects in their pleadings. *Collins v. Arctic Builders,*

---

[2] Mr. Roberts' amended complaint contained sixteen counts. A number of counts were dismissed on August 30, 2004. Currently nine counts remain.

957 P.2d 980, 982 (Alaska 1998). In this case, Mr. Roberts is a skillful *pro se.* Although he has yet to pass the Alaska Bar examination, he is a law school graduate, and from his pleadings it is apparent that Mr. Roberts is familiar with the Alaska Rules of Civil Procedure and the standard for summary judgment.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lincoln v. Interior Reg'l Hous. Auth.,* 30 P.3d 582, 585 (Alaska 2001). The movant has the burden of showing that no issues of material fact exist, entitling them to judgment as a matter of law. *Alaska Rent-A-Car v. Ford Motor Co.,* 526 P.2d 1136, 1141 (Alaska 1974). Additionally, when ruling on a Motion for Summary Judgment, the court must draw all reasonable inferences in favor of the non-moving party. *Clabaugh v. Bottcher,* 545 P.2d 172, 175 (Alaska 1976). Although the issues arise in the context of a summary judgment, many of the claims question the permitting process.

The Supreme Court has stated that, "[h]owever denominated, a claim is functionally an administrative appeal if it requires the court to consider the propriety of an [administrative] determination." *Haines v. State, Commercial Fisheries Entry Commission,* 746 P.2d 892, 893 (Alaska 1987). The Court has traditionally reviewed a wide variety of non-adjudicative administrative and executive actions under the same narrow and deferential standards that apply in administrative appeals. *Southeast*

Alaska Conservation Counsel v. State, 665 P.2d 544, 548 (Alaska 1983).

In *Ellis v. Department of Natural Resources,* the Court was faced with a similar situation. 944 P.2d 491 (Alaska 1997). In *Ellis,* the Department of Natural Resources issued a Mineral Closing Order closing certain state land from mining. *Id.* at 493. Mr. Ellis had been mining in the area that was closed but had failed to file the appropriate claim paperwork with the state. *Id.* Mr. Ellis was precluded from mining at these sites and filed suit against the state challenging the validity of the closure order. *Id.* On summary judgment, The Court determined that the case would be reviewed like an appeal from a final administrative order. *Id.* The court reviewed the Department of Natural Resource's decision under the "reasonable basis" standard. *Id.*

A reviewing court will apply the "reasonable basis" test when reviewing administrative decisions involving complex issues that require agency expertise. *Kelly v. Zamarello,* 486 P.2d 906, 917 (Alaska 1971). Under the "reasonable basis" standard of review, this court gives the agency determination deference as long as it is reasonable, supported by evidence, and there is no abuse of discretion. *Kodiak W. Alaska Airlines, Inc. v. Bob Harris Flying Service, Inc.,* 592 P.2d 1200, 1203 (Alaska 1979). On questions of law where no agency expertise is involved, the "substitution of judgment" standard will be applied. *Jager v. State,* 537 P.2d 1100, 1107 (Alaska 1975).

The counts that are ripe for summary judgment are the following: 2, 3, 4, 5, 6, 7, 9, 11, and 12. On March 29, 2005 Plaintiff filed a motion for summary judgment on counts 2, 3, 5, and 6. The State opposed Mr. Roberts' motion on April 25, 2005 and filed a cross-motion for summary judgment on counts 4 and 7. The State later filed a motion for partial summary judgment and motion to dismiss counts 9 through 12. Mr. Roberts responded with cross-motions on counts 9 through 12. All of the counts that remained following dismissal are now ripe for summary judgment.

Count 2:

Violation of AS 05.15.150(a): in this count Mr. Roberts argues that the Department of Revenue allowed Earth to use its gaming proceeds for a purpose not permitted under the statute.

AS 05.15.150(a) states in relevant part that the proceeds gained through a gaming permit may be used for:

> . . . the awarding of prizes to contestants or participants and to the political educational, civic, public, charitable, patriotic, or religious uses in the state. "Political, educational, civic, public, charitable, patriotic, or religious uses" means uses benefiting persons either by bringing them under the influence of education or religion or relieving them from disease, suffering, or constraint, or by assisting them in establishing themselves in life, or by providing for the promotion of the welfare

> and well-being of the membership of the organization within their own community, or through aiding candidates for public office or groups that support candidates for public office, or by erecting or maintaining public buildings or works, or lessening the burden on government . . .

"Charitable organization" is further defined in AS 05.15.690(6) as "an organization not for pecuniary profit, that is operated for the relief of poverty, distress, or other condition of public concern in the state." The term charity has been interpreted broadly by the Supreme Court. As recently as 2004, the court has referred to "the broad common law definition of 'charity'" and observed that this definition reflects the "humanitarian rationale" of tax exemptions. *Fairbanks North Star Borough v. Dena Nena Henash,* 88 P.3d 124, 132 (Alaska 2004). The common law definition contemplates that there be some public benefit arising out of the labeling of an organization as charitable. The definition states, "It is quite clear that what is done out of good will and a desire to add to the improvement of the moral, mental, and physical welfare of the public generally comes within the meaning of the word 'charity.'" *Id.*

Earth is a charitable organization and was recognized as such by the federal government through its grant of 501(c)(3) tax-exempt status. Earth was listed as a charitable organization for the pertinent period of time related to this lawsuit. The purposes, stated in Earth's articles of incorporation filed with the Department of Commerce, Community and Economic Development are the following:

> 1. To awaken social, political, and fraternal groups to the importance of clean earth, air and water.
>
> 2. To teach and practice individual lifestyles which enhance clean earth, air and water.
>
> 3. To operate the Earth Cycle Program
>
> 4. To engage in such other educational activities as the board of directors shall determine.
>
> 5. To distribute food which is presently being wasted.

Earth used the funds earned through its gaming permit in part to buy bicycles. These bicycles were available to the public to use without charge. The issue is whether this use of funds for the free bicycle program is a permissible use, or whether it violates the statute.

Mr. Roberts argues that, in the context of downtown Anchorage, given its proximity to the Tony Knowles Coastal Trail, bicycles should be rented by paying customers and not offered for free. He argues that allowing anyone to use these free bicycles "created no public benefit, only private burden." It appears that Mr. Roberts would consider this program to be charitable if it were operated in another city in Alaska or even in another part of Anchorage. Essentially if the program did not compete with his for-profit business, he would not object to Earth's free bike program nor deny that the program was charitable.

The Department of Revenue found that the program was charitable and awarded a license to Earth. The Department's determination was reasonable. Earth's articles of incorporation state that its purpose was to "teach and practice individual life-styles which enhance clean earth, air and water." Earth's stated purpose fits within the statutory definition of a charitable organization. Traffic in any urban area is a "public concern" and the Department reasonably could have determined that a free bicycle program would help to alleviate the concern. In addition, riding a bicycle is a healthy activity, and promotes good health among its citizens. The Department made a reasonable determination that Earth and its bicycle program fit within the statutorily defined restrictions for charitable purposes.

Whether the Department of Revenue allowed Earth to use its gaming proceeds for a permissible purpose under the statute is a matter that involves the expertise of the Department, and the reasonable basis standard should apply. The Department's decision in granting a permit has a reasonable basis and will not be disturbed.

The statutory language is very broad, and the literal language of the statute covers matters of public welfare. This court finds that even applying a substitution of judgment standard, and considering the undisputed facts, and as a matter of law, the defendants did not violate AS 05.15.150(a) when the Department granted a permit to Earth and allowed it to run its free bicycle program.

Count 3:

Mr. Roberts alleges that the defendants violated AS 05.15.140(a) by issuing the 2000 gaming permit to Earth. Mr. Roberts contends that Earth was not entitled to a gaming permit under the governing statute, and the Department of Revenue erroneously granted it a permit.

This requires the court to examine AS 05.15.140(a) which states in relevant part:

> The department may not issue or renew a permit except on satisfactory proof that the applicant is a municipality or qualified organization, the activity may be permitted under this chapter, and the issuance of a permit is not detrimental to the best interests of the public. Upon request of the department, the applicant shall prove conclusively each of these requirements before a permit may be issued or renewed.

In order to qualify for a gaming permit an applicant must provide satisfactory proof to the Department of three things; 1) that it is a municipality or qualified organization, 2) that the law permits the proposed gaming activity, and 3) the issuance is not detrimental to the best interests of the public. Mr. Roberts does not contend that the first two prongs of the test have not been met.

Mr. Roberts bases his argument on the third prong of the test. Mr. Roberts argues that in operating its program, Earth competed with other businesses and he equates an impact on his business with a detriment to "the public interest."

Mr. Roberts argues that in issuing the permit his business was adversely effected. Mr. Roberts then argues that this adverse effect would lead to the bankrupting of the government through lost taxes. Mr. Roberts appears to equate his business interests and profits with the "best interests of the public." He appears to contend that if there is a detriment to him and other small businesses, it cannot be in the best interests of the public.

In applying the reasonable basis standard to the decision of the Department of Revenue in granting a permit to Earth, this court finds that there was no error. Again, the language of the statute is very broad, and by no means is subject to the narrow construction advocated by Mr. Roberts. Even if this court substituted its judgment, and applied the law to the undisputed facts, approving a permit to provide free bicycles to the public is not detrimental to the best interests of the public.

Count 4:

In this count, Mr. Roberts pleads a Violation of Public Policy. Mr. Roberts alleges that "[s]tate and defendants' ratification and encouragement of the *Earth Cycle Program* works at cross-purposes to established State and National Public Policy. Ratification and encouragement of nonprofit activities that run counter to established public policy is illegal. State Participation in the Program fails the *Bob Jones* test."

The public policy Mr. Roberts argues is the "capitalist system" and allowing a tax-exempt/non-profit to compete with a tax-paying/for-profit entity violates public policy.[3]

The Supreme Court of the United States has stated "[n]othing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 US 564, 585 (1997). In engaging in interstate commerce a non-profit will naturally compete with for-profit entities. Daily, non-profit charities and organizations compete with for-profit entities. When a non-profit raises funds it must enter the marketplace to raise those funds and to use those funds, and it must compete with for-profit entities in that market. There is no public policy that prohibits a non-profit from competing with for-profits, even in spite of their tax-exempt status. The policy is to the contrary, that non-profits have a very important role in our society, and are not limited to only providing goods and services where there is no competition. There is no violation of public policy in this case.

---

[3] "It is unsettling that it is necessary to explicate the fundamental principle of our capitalist system. Plaintiff respectfully asks this court to reaffirm it." Plaintiff's opposition and Cross-Motion at 4.

The court grants summary judgment on count 4 in favor of the defendants.

Count 5:

Bad Faith Claim: The complaint in the case pled that "Defendants had an affirmative duty to acknowledge and correct known operational errors made by subordinates. Aggrieved citizens are entitled to a good faith written explanation of reasons." In briefing, Mr. Roberts also alleges actions defendants failed to take to correct the "operational errors."

Generally the tort of bad faith arises in the context of an insurer and insured. *Loyal Order of Moose Lodge 1392 v. International Fidelity Ins. Co.*, 797 P.2d 622, 627 (Alaska 1990). Thus, it is not clear what claim is being pled, and whether relief can be granted. Even if the claim of Bad Faith can be pleaded, the "tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a-reasonable basis for said action." *Hillman v. National Fire Insurance Co.*, 855 P.2d 1321, 1324 (Alaska 1993).

Mr. Robert's premise of the bad faith claim rests on the notion that the Department made a mistake, and then refused to correct that mistake. Because the court found above that there was no mistake in the issuance of the permit to Earth, there was no duty to correct any mistake. Clearly there was a reasonable basis for the defendants' decision. This claim is without merit. Summary Judgment is granted for defendants on this claim.

Count 6:

Mr. Roberts alleges that the defendants violated their fiduciary and statutory duties. Mr. Roberts does not establish that there is a fiduciary duty existing between him and the defendants. The undisputed facts set out above do not support any theory of a fiduciary duty.

Thus, the gravamen of this court is the breach of statutory duties. Because the court has found that Earth was properly granted a gaming permit and the proceeds were used for a permitted purpose, defendants breached no statutory duty to Mr. Roberts.

Accordingly, summary judgment is granted for the defendants as they did not breach any fiduciary or statutory duty owed to Mr. Roberts.

Count 7:

Violation of the Public Purpose clause of the Alaska Constitution, Art IX, sec. 6. Article IX, section 6 of the Alaska Constitution states:

> No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

Mr. Roberts argues in his motion for summary judgment:

> Whether general fund money spent of the salaries and office costs of state gaming regulators violates Article IX Section 6 of the Constitution when at the end of the day their oversight is not intended to achieve any discernable public benefit.

In essence, Mr. Roberts argues that the salaries and costs of the Department of Revenue and the Attorney General's office, which are paid from the state's general fund, serve no public purpose and therefore are in violation of Article IX section 6.

The Supreme Court has stated that the phrase "public purpose" "represents a concept which is not capable of precise definition." *R.N. DeArmond v. Alaska State Development Corp.,* 376 P.2d 717, 721 (Alaska 1962). In examining whether a particular action of the legislature that utilizes monies from the general fund violates Article IX section 6, the Supreme Court:

> . . . Adopts for its guidance the general rule, supported by the great weight of authority, that where the legislature has found a public purpose will be served by the expenditure or transfer of public funds or the use of the public credit, this court will not set aside the finding of the legislature unless it clearly appears that such finding is arbitrary and without reasonable basis in fact.

DeArmound, supra at 721.

This court finds that the legislature was not acting arbitrarily and that it did have a reasonable basis when it created both the Department of Revenue and the Attorney General's Office.

Accordingly, summary judgment is granted to defendants.

Count 9:

Mr. Roberts alleges that the state violated his procedural due process rights "because it did not provide advance notice, conduct a hearing or create a written decisional document" when it granted the gaming permit to Earth. Mr. Roberts would have the Department of Revenue conduct a full adjudicative hearing for every gaming permit that is issued in the state of Alaska.

In *State v. Greenpeace,* the court examined a factually similar situation to the present case, wherein a third party challenged an administrative decision. 96 P.3d 1056. There, the court addressed a situation where the state had lifted a stay on a permit without adequate notice to Greenpeace. Following the lifting of the stay, Greenpeace had "an opportunity to present its case . . . " *Id.* at 1067. Greenpeace had several opportunities to "contest the Department of Natural Resources' decision and it continued to do so. It simply failed to convince the commissioner that the stay should be reimposed." Greenpeace asked the DNR to reconsider its decision and the DNR did so and stated that Greenpeace had "failed to provide any countervailing evidence or argument" to lift the stay and "relied on unsubstantiated allegation . . . " *Id.* at 1067. The court held that lifting the stay with little notice to Greenpeace did violate its due process rights, but the "procedures DNR followed after lifting the stay preserved Greenpeace's right to due process." *Id.* at 1068.

Similar to *Greenpeace,* Mr. Roberts alleges that he wasn't provided with adequate notice nor was he provided with an opportunity to be heard. The court finds that Mr. Roberts had many opportunities to contest the issuance of a gaming permit to Earth. Mr. Roberts was in repeated contact with officials in the Department of Revenue and the Attorney General's office and even recorded conversations with then Attorney General Bothelo. Mr. Roberts likewise filed a complaint with the Anchorage Ombudsman who found no due process violations. Mr. Roberts was told that Earth was qualified to conduct gaming activities and that the free bike program fit within the statutory restrictions for the use of funds from gaming activities. The procedures granted to Mr. Roberts after the issuance of Earth's permit "preserved [his] right to due process. *Id.* at 1068.

For all of the aforementioned reasons, this court finds that as a matter of law, the actions of the state and the defendants did not violate the due process rights of Mr. Roberts. Therefore, this court grants the defendants' motion for summary judgment on this count.

Counts 11 and 12:

Substantive Due Process and Privileges and Immunities claim: Mr. Roberts alleges that the state and the defendants violated his substantive due process rights by infringing on his right to "gainful employment and to earn a living . . . " Although difficult to decipher, the court believes that Mr. Roberts is alleging that the gaming statutes violate his right [sic] earn a living by allowing non-profit entities to compete with his for-profit business.

Substantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose. *Mobile Oil Corp. v. Local Boundary Comm'n,* 518 P.2d 92, 101 (Alaska 1974). It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people. The constitutional guarantee of substantive due process assures only that a legislative body's decision is not arbitrary but instead based upon some rational policy. *Concerned Citizens of So. Kenai Pen. V. Kenai Pen. Borough,* 527 p.2d 447, 452 (Alaska 1974).

In analyzing the arbitrariness of a. legislative enactment the court will begin with a presumption that it is proper. *Id.* The party claiming a denial of substantive due process has a "heavy burden" to show that no rational basis for the enactment exists. The Supreme Court states that "if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification."

When ruling on a claim that an enactment has violated substantive due process norms at the summary judgment stage, the existence of facts known to the court which provide such a rational basis is sufficient by itself to establish that the statute or ordinance is not arbitrary, as long as the opponents of the legislation do not assert the contrary of those facts. *Id.* at 452.

In this case Mr. Roberts has failed to carry his "heavy burden" in showing that there is no rational basis underlying the state's gaming statutes. Mr. Roberts gives the court an extensive history of both the Fourteenth Amendment and the Privileges and Immunities Clause of the United States Constitution, but nowhere does he allege that there is no rational basis for the existence of the charitable gaming laws. Essentially Mr. Roberts' argument is that the right to work and earn a living is protected, that right was burdened by the gaming permit issued to Earth, and there is no rational basis for this burden. What Mr. Roberts fails to appreciate is that his right to earn a living is not absolute. In this case, he continues to run his business and that right has not been taken away. In this case, the burden to Mr. Roberts, to be free from competition, is not an unreasonable burden.

The gaming statutes were enacted near the time Alaska became a state. The statutes serve the purpose of allowing municipalities and qualified/charitable organizations to raise funds that must be used for approved charitable purposes. This court finds that this is a rational basis and that the gaming statutes do not violate and did not violate the substantive due process rights of Mr. Roberts.

For the aforementioned reasons, this court grants the defendants' motion for summary judgment on this count.

Conclusion:

Because this court finds that the Department of Revenue's decision to grant Earth a gaming permit was reasonable and that no questions of material fact exist on any claim, this court finds as a matter of law that defendants are entitled to summary judgment on all counts.

Judgment shall be entered in the defandants' favor.

DATED Oct 10/05 at Anchorage, Alaska.

/s/ Sen K. Tan
SEN K. TAN
Superior Court Judge

I certify that on 10-10-05 a copy of the above was mailed/delivered to each of the following at their addresses of record:

P. Roberts
M. Barnhill-AGO

/s/ M. Lucas
Judicial Assistant

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT ANCHORAGE

PETER ROBERTS, an individual,
Plaintiff(s),

vs.

THE STATE OF ALASKA,
WILSON CONDON, an individual,
BRUCE BOTELHO, an individual,
and LARRY MEYERS, an individual,
Defendant(s).

Case No.
3AN-03-5534 CI

JUDGMENT

IT IS ORDERED that judgment is entered as follows:

1. The plaintiff's complaint is dismissed with prejudice.
2. Defendants are awarded attorneys' fees in the amount of $5226.00
3. TOTAL JUDGMENT: $5226.00

Dated this 28 day of Dec, 2005.

/s/ Sen K. Tan
Sen K. Tan
Superior Court Judge

In the Supreme Court of the State of Alaska

Peter Roberts,	)	Supreme Court No. **S-12180**
Appellant,	)	**Order**
v.	)	Petition for Rehearing
State of Alaska,	)	Date of Order: **8/14/07**
Appellee.	)	

Trial Court Case # **3AN-03-05534CI**

Before: Fabe, Chief Justice, and Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

On consideration of the Petition for Rehearing filed on **7/2/07**,

IT IS ORDERED: The petition for rehearing is **DENIED.**

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Supreme Court Justices
Judge Tan
Trial Court Appeals Clerk/Anchorage
West Publishing for Opinions (Opinion #6134, 6/22/07)

15 U.S.C. Section 631. Declaration of policy

(a) Aid, counsel, assistance, etc., to small business concerns The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

* * *

15 U.S.C. Section 4801. Findings and purpose

(a) Findings

The Congress finds that –

(1) efforts to reverse the decline of United States industry has been hindered by –

(A) a serious erosion in the institutions and policies which foster United States competitiveness including a lack of high quality domestic and international economic and scientific data needed to –

(i) reveal sectoral strengths and weaknesses;

(ii) identify potential new markets and future technological and economic trends; and

(iii) provide necessary information regarding the competitive strategies of foreign competitors;

(B) the lack of a coherent and consistent government competitiveness policy, including policies with respect to –

(i) international trade, finance, and investment,

(ii) research, science, and technology,

(iii) education, labor retraining, and adjustment,

(iv) macroeconomic and budgetary issues,

(v) antitrust and regulation, and

(vi) government procurement;

(2) the United States economy benefits when business, labor, government, academia, and public interest groups work together cooperatively;

(3) the decline of United States economic competitiveness endangers the ability of the United States to maintain the defense industrial base which is necessary to the national security of the United States;

(4) the world is moving rapidly toward the creation of an integrated and interdependent economy, a world economy in which the policies of one nation have a major impact on other nations;

(5) integrated solutions to such issues as trade and investment research, science, and technology, education, and labor retraining and adjustments help the United States compete more effectively in the world economy; and

* * *

AFFIDAVIT

STATE OF ALASKA)
) ss
THIRD JUDICIAL DISTRICT)

CLARA BALL, being first duly sworn upon oath, deposes and states as follows:

1. I reside at XXXXX, Raytown, Missouri 64133, and make this affidavit from my own personal knowledge.

2. On August 8, 2000, I went to Anchorage International Youth Hostel at 7th and H Street in Anchorage and obtained an Earth bike in exchange for a $5 deposit.

3. That the young man in charge did not ask me to test-ride the bike and he made no inquiry or assessment of my abilities to safely operate the bikes. The young man did not provide me with any instruction or training, either verbally or in writing, which would have improved or developed my capabilities to ride a bicycle.

4. That the young man in charge made no inquiry concerning my financial means.

5. That the young man in charge had bicycle helmets that he could have loaned me but were not offered to me. No facts or information was provided to me, either verbally or in writing, which would have improved my knowledge of how to safely operate the

bike. However, the young man in charge did say that I shouldn't ride on the sidewalk. He later said that he, personally, does ride on the sidewalk.

6. That the young man in charge did not ask me for what purpose I intended to use the bike.

7. That when I asked where was a good place to ride, the young man said the coastal trail. To get to the trail, I was instructed to take a left onto 4th Avenue and go down a hill to a park. We were not provided a map.

8. That the young man in charge did not provide me, either verbally or in writing, with any information or facts to support the assertion of the placard attached to the back of the bike seat. The placard said the bike program "promotes alternative modes of transportation."

DATED at Anchorage, Alaska, this 15 day of August, 2000.

/s/ Clara H. Ball
CLARA BALL

SUBSCRIBED AND SWORN to before me this 15 day of August, 2000.

/s/ Nathene Farmer
Notary Public in and for Alaska
My commission expires: Sept 3, 2003

Case No. 03-AN-03-5534CI
IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT ANCHORAGE

Roberts v. State, et al

Plaintiff's Reply and Opposition to Defendants' Cross-Motion for Partial Summary Judgment

May 9, 2005

* * *

considered before gaming permits are issued, the State of Alaska is not being fair, decent, or sincere. By sticking to its guns on what is without question a material issue, the State undermines its credibility and does a disservice to the citizens it serves. By sticking to its guns the State is signaling to this Court that it will do the same thing again. This signal must be taken seriously. Plaintiff provides the Court with the following authority to quash it.

1) In *People's Educational Camp Society, Inc. V. Commissioner,* 331 F.2d 923 (2nd Cir. 1963), a nonprofit resort camp was denied IRC 501(c)(4) status based on the fact that it competed actively for public business with other resorts in the area.

2) *Easter House v. United States,* 12 Cl Ct. 476, 487 (1987): "Competition with commercial firms is strong evidence of the predominance of nonexempt commercial purposes."

3) "The commerciality doctrine is essentially this: A tax-exempt organization is engaged in a nonexempt activity when that activity is engaged in a manner that is considered *commercial.* An act is a commercial one if it has a direct counterpart in, or is conducted in the same manner as is the case in the realm of for-profit organizations." Bruce R. Hopkins, *The Law of Tax-Exempt Organizations,* 7th Edition, (1998) pp 629- 630. (Italics in original.)

* * *

If the State knowingly provides gambling proceeds to 501(c)(3) that in turn uses that money to pay for activities that violate the entity's exemption, the State enables and participates in the violation of federal law. That is what the State of Alaska did when *Earth* used State-authorized gaming proceeds provided to capitalize and operate its free bike program. Accepting for the sake of argument the defense's proposition that the Gaming Law's do not require an "operational nexus" there is no escaping the fact that Federal law does. A long line of authorities substantiates the conclusion that the State facilitated the destruction *of Earth's* exemption.

1) "If an organization is found to be organized for tax-exempt purposes, it must then demonstrate that it actually conducts activities that entitle it to exemption." *Independent Ins. Agents of Huntsville, Inc. v. Commissioner of Internal Revenue,* 998 F.2d 898, 900 (11th Cir.1993) (business league's insurance activities not substantially related to accomplishment of exempt purpose).

2) "The focus in deciding whether a corporation qualifies for tax exempt status is on the manner of operation of its business, not just whether it is organized under 'not-for-profit' corporate status." *Senior Citizens Stores, Inc. V. United States,* 602 F.2d 711, 713 (5th Cir. 1979) (quoting *better Business Bureau,* 326 U.S. at 285 n.3, 66 S.Ct.,at 112 (1945))

3) **§1.501(c)(3)-1(a) Organizational and operational tests.** "(1) In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt."

4) **1988 IRS LGM Lexis 81, * Litigation Guideline Memorandum:** "Thus the critical inquiry is whether the activity is carried on in such a manner that nonexempt purposes are only incidentally furthered. If an organization engages in many activities, the conduct of any substantial activity carried on to further a substantial nonexempt purpose will preclude exemption." (Exhibit D.) (Note: Not to be relied upon or otherwise cited as precedent.)

5) *Bob Jones Univ. V. United States,* 461 U.S. 574, 590-91 n. 16, (1983) (quoting from G. Bogert & Bogert, The Law of Trusts and Trustees § 361, at 3 (rev.2d ed. 1977)): "In return for the favorable treatment accorded charitable gifts which imply some disadvantage to the community, the courts must find in the trust which is to be deemed 'charitable' some real advantages to the public

which more than offset the disadvantages arising out of special privileges accorded charitable trusts."

6) "If the activity fails to accomplish the exempt purposes of the organization, it is unrelated business regardless of the existence of fees." 1985 WL 291874, IRS G.C.M 39327, page 4

7) "[T]he evidence indicates that plaintiff's retail sales operation was an end in itself rather than a means to accomplishing a charitable goal." *Senior Citizens* at 714.

8) "We have repeatedly held that organizations whose activities are directed substantially toward social and recreational purposes are not eligible for section 501(c)(3) status." *Wayne Baseball, Inc. V. Commissioner,* TC Memo 1999-304.

9) *State ex rel. Corrigan v. West Shore Center,* 287 N.E.2d 803 (Ohio 1972) (nonprofit dissolved by *quo warranto* proceedings "where record did not show any instance of employment placement activity.")

10) "The presence of a single non-exempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes. *A. Ass'n of Chris. Scls. Etc. v. US.*, 850 F.2d 1510, 1513 (11th Cir. 1988) (quoting Better Business Bureau. v. U.S., 326 U.S. 279, 283 (1945)).

* * *

Case No. 03 AN-03-5534CI

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT OF ANCHORAGE

Roberts v. State, et al

Plaintiff's 8-16-05 Summary Judgment
Memo on Counts 9, 11, and 12

* * *

I. EXECUTIVE BRANCH AUTHORIZATION OF THE PROGRAM INVERTED THE ECONOMIC PLAYING FIELD TURNING A LEGITIMATE PRIVATE SECTOR OCCUPATION INTO A STATE-AUTHORIZED MONOPOLY PAID FOR WITH GAMBLING PROCEEDS

Summary of Argument

Contrary to what the State asserts on page 9 of its Motion, Plaintiff is *not* suing to challenge the State's right to implement and regulate charitable gaming. Plaintiff's position is that the gaming laws – all of them – should be enforced. It is the State, in defense of its agents that has proffered the position that there is "nothing they could or should do regarding the manner in which Earth operated its charitable program." This position and the suggestion on page 9 of its Motion that Plaintiff is challenging a "legislative enactment" is a red herring the purpose of which is to sidestep a discussion on an issue that been consistently framed by Plaintiff from the beginning. From the beginning, it has been and continues to be Plaintiff's consistent position that the gaming laws (specifically AS 05.15.150(a)) can be, should be and indeed must be enforced. The failure and then the refusal of the executive branch to enforce that statute triggered events that targeted a lawful occupation for elimination.

A. No One Will Pay for a Service When They Know They Can Obtain It Down the Street for Free.

* * *

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

Peter ROBERTS, an individual,
Appellant (P)

v.

The STATE OF ALASKA,
Appellee (D)

S-12180

Superior Court Case No. 3AN-03-5534-CI

APPELLANT'S OPENING BRIEF

June 1, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES .... a
PERTINENT PROVISIONS OF AUTHORITIES PRINCIPALLY RELIED UPON .... e
STATEMENT OF JURISDICTION 1
PRELIMINARY STATEMENT 1
PRELIMINARY ISSUES FOR REVIEW 2
STATEMENT OF THE CASE 3
  I. ISSUES AT THE LOWER COURT OVER THE INTERPRETATION AND ENFORCEMENT OF ALASKA'S GAMING LAWS 3

A. The Statutory Command to Enforce the Gaming Laws and Protect the Public 3

B. The Dispute over the Plain Language of the Limitation Provision 4

C. Agreement on Legislative Intent 4

D. The Dispute Over Applicability of the Common Law Meaning of Charity 4

E. The Dispute Over the Relevance of *Griffin* 5

F. The Dispute Over the Interplay With Federal Law 5

II. THE CHALLENGED PROGRAM AND ITS AUTHOR 5

A. Operational Approval of the "Earth Cycle Program." 5

B. Michael O'Callaghan and Judicial Notice 6

C. Facts and Circumstances of the Program and the Interests of the Community 6

III. THE STATE'S REASONS FOR AUTHORIZING THE PROGRAM AND CONCLUSIONS FOR ALLOWING IT TO CONTINUE 7

A. The State's *Post Hoc* Basis of Belief to the Bike Renters 7

1. First Conclusion: "Civil Matter between Earth and the Bike Renters." 7

a. "An investigation is ongoing." 7

2. Second Conclusion: It "Seems to Fit." 8
3. Third Conclusion: "We Can't and Shouldn't [Act]." 8
4. First Rationale: We "Feel" the Program is Charitable – "Exercise." 8
    a. "Think of what we have said and done in the past." 9
5. Third Conclusion: Reaffirmed 9
6. Fourth Conclusion: "Irrelevant" *But For* Causation 9
    a. The dispute over ¶ 32 and an "affirmatively alleged" statement 10

B. Supervisors' *Post Hoc* Basis of Belief to the Ombudsman 10

Second Rationale: "Qualified Organization." 10
    a. The dispute over a written record of reasons 11

C. Interregnum Basis of Belief 11

D. The State's Procedural *Post Hoc* Judicial Positions 12
1. Fifth Conclusion: No Causation 12
2. Third Rationale: The Program is charitable 12

E. The Dispute Over the Doctrine of Quasi-Estoppel 12

F. The State's Summary Judgment Position 13

1. Fourth Rationale: Education/ Promotion of Ecological Values 13

STANDARD OF REVIEW 14

SUMMARY OF THE ARGUMENT 14

ARGUMENT 16

I. THE SUPERIOR COURT'S REVIEW OF THE RECORD WAS CLEARLY ERRONEOUS BECAUSE IT ASSUMED FACTS NOT ENTERED INTO EVIDENCE AND IGNORED UNDISPUTED MATERIAL FACTS THAT JUSTIFIED JUDGMENT FOR ROBERTS 16

A. The State and the SJO's Approval of the Program is Unsupported by Facts 16

B. The Superior Court Erred Because It Ignored Known Danger Signals 17

C. The Court Substitutes Its Judgement on Issues of Statutory Interpretation 18

D. The SJO's Review of the Record is Mistaken and Arbitrary 19

E. Conclusion Regarding the SJO's Arbitrary Review of the Record 21

COUNTS 5 & 6 – BAD FAITH/ABUSE OF DISCRETION; BREACH OF FIDUCIARY AND STATUTORY DUTIES 21

* * *

[Pages 21-24]

COUNTS 5 & 6 – BAD FAITH/ABUSE OF DISCRETION; BREACH OF FIDUCIARY AND STATUTORY DUTIES

Question Presented

Did the SJO correctly conclude that Appellant's claim of bad faith is "without merit" or are conflicting *post hoc* verbal, investigatory and judicial rationales and a refusal to create a written record of reasons *prima facie* evidence of bad faith?

I. MR. ROBERTS IS ENTITLED TO SUMMARY JUDGMENT ON COUNTS 5 & 6 BECAUSE CONFLICTING *POST HOC* VERBAL, INVESTIGATORY AND JUDICIAL RATIONALES AND THE REFUSAL TO ISSUE A WRITTEN DECISIONAL DOCUMENT IS *PRIMA FACIE* EVIDENCE OF BAD FAITH.

The SJO held the bad faith claim "is without merit." [Exc. 231] Set forth below are 18 unacknowledged undisputed material facts that compel the opposite conclusion.

1) Fact: What Meyers told Roberts [21-22] cannot be reconciled with the deceptive interpretation Meyers provided the Ombudsman. [Exc.31-32] [Exc. 11-112]

2) Facts: What Meyers told the Ombudsman [Exc. 31-32] cannot be reconciled with what defense

counsel told the Court. [Exc. 138, 171]; or with what the State asserted in *Griffin*. [Exc. 1-3, 113-114].

3) Fact: What defense counsel told the Court [Exc. 138, 171]] cannot be reconciled with the determination attributed to the Department by the SJO. [Exc. 226]

4) Facts: The "can't [act]" reaffirmed written conclusion [Exc. 17,26] provided to aggrieved citizens cannot be reconciled with the legislative command to apply the gaming laws [Exc. 102-103] or with what this Court was told in *Griffin*. [Exc. 1-3, 113-114]

5) Fact: Mr. Dodson's bad faith conduct [Exc. 42] is corroborated by a fax [Exc. 11-12] and a sworn affidavit. [Exc. 88, 114-115]

6) Facts: Emails prove regulators reacted with callous indifference toward the continuing and particularized injury [Exc. 105] they unleashed: "Roberts is screwed!" [Exc. 6]; "Roberts is peeved" [Exc. 7]; "Bicycle Squabble" [Exc. 8]. "Heads up" [Exc. 7].

7) Fact: Meyers implicitly acknowledged Department prevarication: "Think of what we have said and done in the past." [Exc. 18]

8) Fact: The Department refused to issue a written decisional document thereby violating this Court's and the U.S Supreme Court's well-established rule. [Exc. 108-110]

9) Fact: In the face of a written request for corrective action, the Dept. of Law declined to respond to a

continuing and particularized harm. [Exc. 106-107, 125-129]

10) Fact: The Attorney General acknowledged Earth should not have received a gaming permit and then asserted *but for* causation is "irrelevant." [Exc. 24,] The defense denied the taped statement [Exc 46, 86] and then "affirmatively alleged" something that was never said. [Exc. 24] After initial disclosures, instead of correcting the record [Exc. 115-116], defense counsel attributed the statement to Roberts [Exc. 139]. When Roberts rebuffed the Orwellian assertion [Exc. 164-165] defense counsel faulted Roberts's "perspective" [Exc. 193-199].

11) Fact: Without any supporting facts, and without ever defining what an "ecological lifestyle" is, the State advanced the frivolous argument that the Program was charitable because it was "conceivable" it was "educational." [Exc. 138, 171]

12) Facts: The State ignored undisputed facts in affidavits that prove the Program is not charitable or educational. [Exc. 13, 14].

13) Fact: Defense counsel refused to correct a verifiably wrong "affirmatively alleged" assertion in ¶ 20 of the Answer. [Exc. 84-85, 106-107]

14) Fact: Defense counsel refused to produce a document that a referened exhibit purportedly proved compliance with AS 05.15.030. [Exc. 133-134, 145-148]

15) Fact: The State acknowledged in ¶ 62 of its Answer the fiduciary duty to mitigate harm caused by a subordinate. [Exc. 104-105] Previously, the State told undermined aggrieved citizens their "remedies should be found elsewhere." [Exc. 25]

16) Fact: It took five years for the State to announce its "educational" rationale for approving the Program. In the interim, it proffered the frivolous proximate cause defense that "Earth arguably would have offered the free bicycles with or without state-sanctioned charitable gaming money." [Exc. 64]

17) Fact: After Plaintiff asserted the Program had no nexus with its goal and that it violated Federal law, defense counsel made the frivolous assertion that "there is no requirement of compliance with federal law, and there is no requirement of advance approval of expenditure of net proceeds." [Exc. 168]

18) Fact: After defending the Program, the State disavowed it: "[D]efendants had nothing to do with the free bicycle program in the first place." [Exc. 241]

Conclusion

With all due respect to Judge Tan, his conclusion that the bad faith claim is "without merit" is itself, without merit. [Exc. 231] The SJO's conclusion that "[t]he undisputed facts set out above do not support any theory of a fiduciary duty[ ]" likewise is without merit. *Id.* Accordingly, viewing the undisputed material facts in a light most favorable to the State, Appellant is entitled to summary judgment on Counts 5 & 6.

* * *

[Pages 43-44]

I. MR. ROBERTS IS ENTITLED TO SUMMARY JUDGMENT ON COUNTS 11 AND 12 BECAUSE EXECUTIVE BRANCH AUTHORIZATION OF THE PROGRAM INVERTED THE ECONOMIC PLAYING FIELD TURNING A LEGITIMATE PRIVATE SECTOR OCCUPATION INTO A STATE-AUTHORIZED MONOPOLY PAID FOR WITH GAMBLING PROCEEDS

Standard of Review

> When conduct of a member of the executive branch is at issue, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." To impose liability, "executive action must be so ill-conceived or malicious that it "shocks the conscience;" mere negligence is insufficient. . . . Therefore, in assessing whether plaintiff's state a substantive due process claim . . . the determinative inquiry is whether these individuals had some evidence . . . on which to base their action. *Gedrich v. Fairfax County Dep't of Family Services*, 282 F. Supp. 439, 460 (E.D. Va, 2003) (internal citations omitted)

The SJO erred because it applied the rational basis standard of review to the legislature's enactment of the gaming laws. [Exc. 236] The record establishes that Plaintiff Roberts *repeatedly* asserted that his right to earn a living was infringed *not* by "legislative enactment" but by the "failure and then the refusal of the executive branch to enforce" the gaming statutes. [Exc. 210] in spite of Plaintiff's explicit reference to the "EXECUTIVE BRANCH" in his point heading, his assertion that "the gaming laws – all of them – should be enforced," and his caveat to the court that the State's "legislative enactment" argument was a "red herring," the Superior court took the bait. [Exc. 210] "In the case Mr. Roberts has failed to carry his 'heavy burden' in showing that there is not rational basis underlying the state's gaming statutes." [Exc. 237]

In substituting its judgment for the Superior Court's, Appellant respectfully refers the Supreme Court to his still unreviewed argument on these counts [Exc. 203-214] The merits of Mr. Roberts's position have yet to be reviewed

Conclusion on Counts 11 & 12.

By abdicating its duty to enforce the State's gaming laws and carry out the intent of the Legislature, the executive branch maliciously targeted Mr. Roberts's chosen occupation for elimination. Accordingly, pursuant to: 1) Substantive due process; 2) Article I § 1 Of The Alaska Constitution; and 3) The privileges or immunities clause of the Fourteenth Amendment of the U.S. Constitution, judgment should be entered for Mr. Roberts and Counts 11 and 12.

* * *

[LOGO] **State of Alaska**
Ombudsman

March 26, 2002

RE: Ombudsman Complaint A2001-0367 (discontinued)

Gentlemen:

* * *

Mr. Meyers stated that EARTH does not have to be a charitable organization to obtain a permit, just a "qualified organization." He stated that a group of people could form a dart club, conduct activities for three years and then apply for a permit. In fact, one permit holder in Anchorage is the Alaska Soft-Tip Dart Association. Another is the Boniface Bingo. They are all qualified organizations but not charities in the state's view.

As part of my review, I searched the Gaming database for organizations with gaming permits. Among the permit holders in Anchorage, I compiled the following random list:

#364	Alyeska Ski Club;
#416	Anchorage Log Cabin Quilters;
#437	Abused Women's Aid In Crisis;
#512	Big Brothers Big Sisters of Anchorage;
#854	Alaskan Sled Dog Racing Association;
#1005	Crow Creek Pipes and Drums;

#1033 Anchorage Alumni Foundation;

#1039 Alaska Fly Fishers;

#1335 Alaska Soft-Tip Dart Association;

#1503 Boniface Bingo;

#1525 Alaska 700 Bowling Club;

#1806 Imperial Court of All Alaska;

#1840 Alaska Barrell (sic) Racers Association;

This broad cross section of organizations, including a bingo parlor, all fall under the interpretation of the gaming permit eligibility in the opinion of Gaming, Revenue and Law. All are qualified organizations but some of them clearly don't qualify as "charities."

Mr. Meyers stated that Alaska gaming statutes were broadly constructed because the Alaska Legislature did not wish to place intrusive restrictions on charitable gaming in Alaska. It is his legal opinion, and apparently the opinion of Revenue Commissioner Wilson Condon, that the Gaming Division has properly interpreted the statute since it was first approved in 1966.

* * *

Peter Roberts

333 W. 4th Ave., #206 • Anchorage, AK 99501
(907) 279-3334 • Fax (907) 279-8338
email: bicyclealaska@aol.com

July 13, 2007

Cheryl Jones
Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501

Re: Correction of Caption in Opinion No. 6134 – June 22, 2007. S-12180.

Dear Ms. Jones:

The Opinion of the caption of the above numbered Supreme Court case listed individuals who were not named by either party or by this Court in any document during the appeal process.

Attached is a copy of page 2 from Appellant's Appeal Points. Please note the highlighted paragraph where Appellant gave specific notice that Count 14 "is not appealed. . . . Accordingly, the individual defendants have been dropped from the caption of the case."

Sincerely,

/s/ Peter Roberts
Peter Roberts

cc: Dan Branch. Assistant Attorney General

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

Peter ROBERTS, an individual, Appellant (P) v. The STATE OF ALASKA, Appellee (D)	) S-12180

Superior Court Case No. 3AN-03-5534-CI

APPELLANT'S PETITION FOR REHEARING

In order to comport with controlling U.S. Supreme Court precedents, and with the overlooked undisputed briefed material facts that triggers them, pursuant to Appellate Rule 506, Appellant petitions for rehearing. For reasons specifically set forth below, this Court's June 22, 2007 Opinion merits supplemental scrutiny.

Rehearing is in Order Because the Most Important Material Fact and the Controlling Authority it Triggers Was Either Overlooked or Inexplicably Ignored.

The crux of Appellant's case is the undisputed material fact that the State repeatedly refused to provide citizens aggrieved by agency action with a written record of reasons. (*Passim.*) This Court has "long held" that "agency decisions" . . . "**must** be accompanied by written findings and a decisional document."[1] The "record [must] clearly reflect[] the reasoning underlying the agency's decision." *Id.* Without explanation, this Court's June 22, 2007 ignores its own and controlling U.S. Supreme Court precedent.

> [A] 'reasons' requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies and as noted by the Court of Appeals in this case, the need to assure careful administrative consideration 'would be relevant even if the Secretary's decision were unreviewable. *Dunlop v. Bachowski,* 421 U.S. 560, 572, 95 S.Ct. 1851, 1860 (1975) (*See also* [Exc. 110]

The Program was instituted in downtown Anchorage without notice, public process or post-approval written explanation or justification. *Passim.*

Rehearing is In Order Because There is No Way to Square What the State's Agent's Have "Said and Done in the Past"[2] With What this Court Said the Department "*could* reasonably have determined."[3]

---

[1] *Usibelli Coal Mine v. State,* 921 P.2d 1134, 1149 (1996) (Emphasis added) (Roberts at 15.) [Exc. 108-109] *See also, Alaska Center for the Environment v. State,* 80 P.3d 231, 252 (Alaska 2003) Roberts at Authorities Principally Relied Upon and on page 32.

[2] Larry Meyers's interagency email. *Passim.* [Exc. 18]

[3] Opinion at 14.

Fact: The State admitted in ¶ 59 that the "legislature did not intend for the gaming laws to provide free recreation to out-of-state tourists at the expense of existing tax-paying businesses, their owners, and employees." (Roberts at 31) [Exc. 49, 87.]

Fact: The State tacitly acknowledged the Program is not rationally-related to "alleviating traffic in an urban area."[4]

Fact: Former Attorney General Botelho admitted "Earth should not have received a gaming permit."[5]

Fact: After Larry Meyers told the Ombudsman the Program does not need to be charitable, she closed her investigation equating Earth with 13 other organizations that "clearly don't qualify as 'charities.'" (Roberts at 10.) [Exc. 32][6]

---

[4] "There is no 'operational nexus' requirement, there is no requirement of compliance with federal law, and there is no requirement of advance approval expenditure of net proceeds." Roberts at 5. [Exc 168]

[5] Roberts at 9. [Exc. 24]

[6] In its opinion at 15, this Court wrote: "Any slight variations in the State's explanation – such as whether Earth was a 'charitable organization' or fell into the more broad category of 'qualified organization' – do not rise to the level of inconsistency or unconscionability required for application of quasi-estoppel." Assuming *arguendo* the State's pre-litigation explanation is slight, it is not slight for the State to remain silent with the knowledge that the Ombudsman misunderstood them. The position attributed to the Department by the Superior Court and

(Continued on following page)

Fact: ¶ 2 of the States Answer states: "Defendants are without information sufficient to admit or deny the allegations regarding who used the Earth bikes. . . . "

These undisputed material facts *prove* what the Department *DID* determine, not what it "could reasonably have determined." Overlooking these facts triggers not only rehearing, it triggers controlling U.S. Supreme Court precedents:

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.[7]

"The basis for an agency determination 'must be set forth with such clarity as to be understandable.'" *Id. at* 1189, 196-197.

"The orderly functioning of the process of review ***requires*** that the ***grounds*** upon which the administrative agency acted be ***clearly*** disclosed and ***adequately*** sustained."[8]

"[I]t is elementary that if an agency's decision is to be sustained in the courts on any rationale under

---

advanced by the State on appeal cannot be squared with the Ombudsman's conclusion. [Exc. 32]

[7] *Recinos DeLeon v. Gonzalez,* 400 F. 3d 1185, 1189 (9th Cir. 2005) (quoting *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943)) Roberts at 20 and at [Exc. 110].

[8] *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943) (Emphasis added.) Roberts Reply at 7-8.

which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency."[9]

Rehearing is In Order Because Roberts Alleged, the Facts Proved, and the State Admitted the Program Does Not Comply With Federal Law.

In the face of affidavits [Exc 13-14][10] establishing that there is no "operational nexus" between the Program and the *post hoc* judicially-identified goal, in spite of the State's contention alluded to above in footnote 4, this Court held that "[t]he Earth Cycle Program is rationally related to the objectives of the organization. . . ." "Operational nexus" and "rationally related" are two terms that define the same thing.[11] Absent nexus, the justification for exemption is destroyed.[12] The Court's "rationally related" conclusion is not based on facts, but on a justification:

---

[9] *Fort Stewart Schools v. Fe. Labor Relations Board*, 495 U.S. 641, 651-652, (1990) Roberts Reply at 11.

[10] Without offering, helmets, a map, or making any inquiry into whether they owned a car or for what purpose they would be used, Earth provided two residents of Missouri with free bikes and told them to ride on the Coastal Trail.

[11] Roberts Reply at 13.

[12] "The presence of a single non-exempt purpose, if substantial in nature, will destroy the exeption regardless of the number or importance of truly [exempt] purposes." *Ass'n of Christian Schools v. U.S.*, 850 F.2d 1510, 1513 (11th Cir. 1988) (quoting *Better Business Bureau v. U.S.*, 326 U.S. 279, 283 (1945)).

"Roberts addressed the program's impact on traffic in his summary judgment memorandum." (Opinion at 14.)[13] In effect, this Court made the *sua sponte* conclusion "that it rained yesterday simply because a litigant asserted 'there is no evidence' that it did."[14] Federal law defeats what is supposed to be the "sparingly exercised" legal doctrine of *State v. First National Bank of Anchorage.* (Appellee at 16, n.83; Roberts Reply at 9.) As the long list of unacknowledged Federal authorities regarding "operational nexus"[15] [Exc 159-161] and the "commericiality doctrine" [Exc. 152-153] irrefutably establish, this Court's conclusion regarding preemption is verifiably wrong.[16]

---

[13] In his summary judgment memorandum at [Exc. 122-123], Roberts wrote: "There is *no* evidence that anyone got out of a car and onto a bike. If the defense really believed their *post hoc* conclusion had merit, they would have explained it on paper. No written record can be created because there has never been any evidence to expound."

[14] Appellant's Reply Brief at 9.

[15] "The focus in deciding whether a corporation qualifies for tax exempt status is on the manner of operation of its business, not just whether it is organized under 'not-for-profit' corporate status." *Senior Citizens Stores, Inc. v. United States,* 602 F.2d 711, 713 (5th Cir. 1979) (quoting *Better Business Bureau v. U.S.,* 326 U.S. 279, 285 n.3 (1945). [Exc. 159]

[16] On page 16 of the Opinion this Court states: "Because Roberts does not allege that it would be impossible for an entity to comply with both state gaming laws and federal laws of tax exemption, conflict preemption does not apply.

Conclusion

For these and other reasons that implicate the integrity of the judicial process, Appellant petitions for rehearing.

Dated: July 2, 2007.

Peter Roberts
C/o Downtown Bicycle Rental
333 W. 4th Ave., # 206
Anchorage, AK 99501.

Certificate of Service

This is to certify that on July 2, 2007, a copy of this document was mailed to Assistant Attorney General Dan Branch at his address of record in Juneau, Alaska.